S. HRG. 99-497

# DEATH PENALTY LEGISLATION

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

## S. 239

A BILL TO ESTABLISH CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF THE SENTENCE OF DEATH, AND FOR OTHER PURPOSES

SEPTEMBER 24, 1985

**Serial No. J-99-53**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
57-465 O WASHINGTON : 1986

S521-38

57-465 O - 86 - 1

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# DEATH PENALTY LEGISLATION—S. 239

TUESDAY, SEPTEMBER 24, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The committee met, pursuant to notice, at 2:05 p.m., Hon. Strom Thurmond (chairman) presiding.

Also present: Senators Grassley, Denton, Specter, and McConnell.

Staff present: Duke Short, chief investigator; Bill Miller, chief counsel and staff director, Criminal Law Subcommittee.

## OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have a hearing this afternoon to consider the capital punishment bill. We had planned to have it tomorrow morning, but on account of Yom Kippur, at the request of Senator Levin and others, we have decided to hold it this afternoon.

At this point I wish to place the opening statements of several committee members and a copy of S. 239 in the record.

[The material follows:]

### OPENING STATEMENT OF CHAIRMAN STROM THURMOND

Today, the Committee will receive testimony on S. 239, a bill to establish constitutional procedures for the imposition of the death penalty by Federal courts in appropriate cases. This is at least the sixth hearing held by the Committee or its subcommittees on capital punishment legislation in the last five years and the twelfth since the Supreme Court invalidated certain state death penalty procedures in 1972.

Most recently, the Subcommittee on Criminal Law held four days of hearings in 1983 on the Comprehensive Crime Control Act, S. 829, which contained in Title X a proposal that is virtually identical to the legislation now before us. The subcommittee heard testimony on Title X by the Department of Justice, the American Civil Liberties Union, and the National Legal Aid and Defender Association, and others.

After the hearings, the Committee marked-up Title X and ordered it reported as an original bill, S. 1765. The Senate then passed S. 1765 by a vote of 63 to 32. The bill before us today contains the language which the Committee and the Full Senate approved last Congress. The Committee had also favorably reported similar death penalty legislation to the Senate in the 96th and 97th Congresses.

This is important legislation. It is supported by a large majority of the American people, and it deserves swift enactment by the 99th Congress.

No one maintains that this legislation alone will cure the epidemic of violent crime that plagues our nation. The American people, however, recognize that a fairly imposed death penalty is the appropriate penalty for certain terrible crimes. Capital punishment, together with the recently enacted reforms of our Federal bail and sentencing laws and the proposed reforms of Federal habeas corpus jurisdiction and the exclusionary rule, will go a long way toward restoring rationality to the Federal criminal justice system and restoring the people's respect for that system, a respect that is vital for a government under law.

### Opening Statement of Senator Charles E. Grassley

Mr. Chairman: I want to commend you for calling this hearing on S. 239, which establishes constitutional procedures for the imposition of the death penalty.

In view of its irrevocable nature, I have attempted to explore every aspect of the capital punishment sanction. My research has strengthened my belief that certain offenses are so abominable that the only just punishment is death. To attach any lesser penalty is to undermine the system of justice, both educationally in principle and operationally in practice. For these reasons, I am an original cosponsor of S. 239.

It is clear that a greater than normal degree of fairness and responsibility is required in capital cases. I therefore look forward to clearing up any problems that S. 239 may have, so that we may proceed in implementing constitutional procedures for the imposition of the death penalty.

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### Opening Statement of Senator Jeremiah Denton

Mr. Chairman, I join in strong support of S. 239, a bill to establish constitutional procedures for the imposition of the sentence of death for certain Federal offenses. I commend you for sponsoring this important piece of legislation.

Not since the Supreme Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), striking down Federal and State death penalty statutes that allowed for unguided discretion by the trier of fact to determine whether or not the death penalty should be imposed, have American citizens had the protection in Federal law that capital punishment can provide. The bill provides for the return of that protection by incorporating constitutionally acceptable procedures that guard against the unfettered discretion condemned in *Furman*.

Following the 1976 rulings by the Supreme Court in a group of landmark death penalty cases (*Gregg* v. *Georgia*, 428 U.S. 513 (1976); *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976)), the bill provides for a bifurcated trial. That is, first the trier of fact would determine guilt or innocence. Then, after the defendant is convicted of an offense for which the penalty of death is authorized, the court would hold a separate hearing to determine whether or not the death penalty should be imposed. At that hearing, which would normally be before the same jury that conducted the trial, or before the judge if both parties agree, both sides would have an opportunity to present all relevant information. That procedure would require the factfinder to determine the existence of statutory aggravating and mitigating circumstances as a basis for proceeding to the ultimate determination of the penalty to be imposed.

Putting the death penalty back into the Federal criminal justice system is a step that, in my view, is long overdue. For far too long, the pendulum of justice has swung in the wrong direction, and too much attention has been paid to the rights of convicted criminals. The excess of attention that has been given to the rights of criminals has been produced by sacrificing the greater right of society to live free from the fear of violent harm and by ignoring the rights of the victims against whom convicted criminals have committed their heinous crimes.

Claims from some quarters that support for abolishment of the death penalty is growing are just not true. In fact, support for capital punishment is widespread. The American Bar Association/University of Chicago poll found that over 73 percent of the citizens polled were in favor of capital punishment. An April 1985 ABA poll found 68 percent of lawyers and law students in favor of death sentences. A February 1985 Gallup poll indicated that 72 percent of Americans favored the death penalty for persons convicted of capital crimes. Additionally, some 38 States have provided for a death penalty since the Court restored the punishment in 1976.

Governments, particularly governments of law and not of men, have no higher duty than to protect the governed from harm. The Founding Fathers themselves recognized that principle and gave it the primacy it deserves by setting forth in the Preamble to our Constitution the mandate to "establish Justice" and to "provide for the common defense." The death penalty implements the principle not only by providing a deterrent to individuals, but also by providing a social and general deterrence to crime by showing the seriousness with which the society views extreme cases of unlawful conduct.

Capital punishment also serves the legitimate function of retribution. It allows society to extract legitimate retribution from people whose behavior so transcends the bounds of acceptable conduct that they take the lives of their fellow citizens. Additionally, it allows society to express its outrage and sense of revulsion toward those

who undermine the foundations of our society through contravention of its law. Not only must innocent life be protected by any society, but that society must be willing to impose its severest penalty upon those who take the lives of others.

Mr. Chairman, because of the absence of constitutionally acceptable capital punishment procedures, we face an egregious problem, especially in our Federal prisons. Currently, inmates serving life sentences can commit murder with impunity. To cite one example: In October 1983, a prisoner in the Federal Correctional Institution in Marion, IL, mortally stabbed a guard 45 times! Later that same day, a second inmate managed to get free from his handcuffs, murdered one guard and critically wounded two others. While help was on the way, this inmate did a "victory dance" along the row of other prisoners. Both of these criminals knew fully well that the worst that could happen to them was the imposition of a life sentence in addition to the ones they were already serving.

This one example offers a compelling reason why we need to have the death penalty in Federal courts. Until we do, men like this will continue to kill and maim with impunity.

In conclusion, I reiterate that the primary responsibility of society is to protect its members so that they may live their lives in peace and safety. I believe that the availability of the death penalty in Federal courts is necessary if the Government is to fulfill that responsibility.

Thank you, Mr. Chairman.

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### Opening Statement of Senator Arlen Specter

Mr. Chairman, I support this legislation to provide for the availability of the death penalty under certain circumstances. I supported this legislation last year, and it was approved by the Senate, though never acted upon by the House.

In my judgment, it is appropriate for the Congress of the United States to reinstate the death penalty under the carefully selected standards of S. 239. It is my view that this legislation will have substantial significance as a model for the 50 States. Many of the States have not reinstated the death penalty and some did not have the death penalty prior to the case of *Furman* v. *Georgia* and the Supreme Court decisions which have followed.

In supporting the death penalty, I do so based upon some 14 years of experience as a prosecuting attorney, including 8 years as district attorney of Philadelphia, on my experience as a defense attorney, and from the hearings which have been held before this Committee. The essential reason that I support the death penalty is that, in my judgment, it is a deterrent against murder and a deterrent against crimes such as burglary, robbery, rape, and arson, which are likely to result in murder.

My experience as a district attorney has placed me in contact with many cases which illustrate the deterrent effect of capital punishment. I have known of many professional burglars and robbers who have stated that they will not take a weapon along in the course of a robbery or burglary for fear that someone will die and that they might face the death penalty.

A concern that I have, and it has been eloquently articulated by those in opposition to the death penalty, is the problem of mistake. My thought is that with the refinements in the procedures for imposition of the death penalty and with the split verdict procedure now in effect, the chance of mistake is greatly diminished. It used to be that a defendant's prior record was submitted to the jury at the same time that the jury considered innocence or guilt. The instruction to the jury not to consider the prior record until the jury had decided innocence or guilt was obviously impossible for jurors to follow. Now, however, the unitary trial procedure has been abolished. Instead, there is a verdict as to guilt and then there is a separate proceeding in which one's prior record and other aggravating or mitigating circumstances are considered.

With extensive safeguards, including identification through the use of the lineup, we have gone a substantial distance toward eliminating the possibility of error. I do not believe it can be said with assurance that it is ever possible in any judicial proceeding, however careful we may be and however meticulous the procedural safeguards may be, to eliminate all possibilities of error. I do think, however, that the errors are few and that, on balance, when considering the desirability of a clear public policy on this subject, the balance is in favor of protecting the numerous innocent victims of murders whose lives would be saved were this deterrent procedure in effect.

On July 26, 1985, I introduced legislation, S. 1508, to provide for the death penalty for terrorists who murder American hostages abroad. In drafting this legislation, I

incorporated the carefully crafted procedural safeguards of this death penalty bill as it passed to the Senate last February. Had this legislation been enacted prior to the TWA hijacking, those terrorists who so brutally murdered the young Navy diver, Robert Stethem, could be subject to the death penalty. This is just one example, and a forceful one I think, of why I support this bill.

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### Opening Statement of Senator Mitch McConnell

Mr. Chairman, I commend you for holding this hearing on S. 239, a bill to establish constitutional procedures for the imposition of the sentence of death. Unlike most of the members of this committee, I was not a Member of the Senate when the last hearing was held on the subject, and so I especially appreciate the chance to receive the testimony of the distinguished witnesses on this subject.

As you know, Mr. Chairman, a great debate has raged for many years about the propriety of the death penalty, a debate that reached its zenith with the Supreme Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). In that case, the Court in essence invalidated the statutes authorizing the death penalty in all the States, as well as at the Federal level. Since then, some 37 jurisdictions have reinstituted the death sentence, with approriate safeguards for due process. Those statutes, many of which have gone through rigorous scrutiny, generally provide for the consideration of both mitigating and aggravating circumstances in deciding whether capital punishment should be imposed.

I believe that States have done an admirable job in reformulating those statutes, and that their work is indicative of the fact that in certain circumstances, the majority of the people of this Nation believe that capital punishment is necessary and appropriate. One area in which I believe it to be especially appropriate is the area of espionage. There seems to be little basis for the suggestion that capital punishment for espionage, i.e., treason, is unconstitutional. Just as importantly, I believe that the possibility of a penalty of death is perhaps the most effective deterrent we can impose in an effort to prevent the kind of espionage that we have experienced recently.

Numerous bills have been introduced recently that would impose a sentence of death for espionage, and it seems appropriate that this committee should examine the question of a general provision in conjunction with the Senate's consideration of those bills.

I look forward to the testimony of the witnesses, and thank you, Mr. Chairman.

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### Opening Statement of Senator Dennis DeConcini

Mr. Chairman, I support S. 239 a bill to establish rational procedures for the imposition of the sentence of death in specified limited circumstances. S. 239 was carefully and narrowly drafted to comply with U.S. Supreme Court decisions establishing procedural guidelines for imposition of the death sentence. I was convinced that these procedures met the requirements of the Constitution when first introduced in 1977. I am even more convinced as subsequent Supreme Court decisions have been announced.

Before I became a county prosecutor, I had not given a great deal of thought to the question of whether society should impose the death penalty. I had an uncomfortable feeling about putting people to death. But after becoming a prosecutor and coming into close contact with certain individuals we, unfortunately, have in our society, I made up my mind. Investigating the facts of the crimes these individuals committed and talking to both the victims' families and friends and the perpetrators themselves convinced me that some people commit acts that are so outrageous and destructive that they forfeit their own right to life.

To me, it comes down to the question of who, in our society, we wish to protect. Do we wish to act to deter and prevent criminals from killing innocent persons or do we wish to protect those very few in our society who have turned their backs on our customs and moral values and taken an innocent human life for their own selfish purposes. My conclusion is that we must do all we can to protect innocent lives even if it means taking a very few guilty ones.

The issue and arguments surrounding the use of the death penalty are among the most familiar in American debate. Polls consistently show that two-thirds of the American people favor the death penalty; thirty-nine States have death penalty statutes; and in my home State of Arizona, over 80 percent of the people have indicated they favor a death penalty for certain offenses. All polls show that a clear majority of the American people want to see a death penalty statute enacted.

I am sure that, under the able leadership of our chairman, this committee and the Senate as a whole will approve this legislation once again. I am hopeful that the House of Representatives will also approve death penalty legislation this Congress.

S. 239 was introduced in the 99th Congress by Chairman Thurmond. Once again, as in the 98th Congress, I am pleased to be listed as the first original cosponsor of this legislation.

Congress has given extensive legislative consideration to the death penalty issue in previous Congresses. Since the 1972 *Furman v. Georgia* decision struck down the existing Federal and State capital punishment procedural statutes, bills to restore the death sentence have been introduced in each succeeding Congress. In the 96th and 97th Congresses, death penalty legislation was favorably reported by this committee, but was not considered by the Senate. Last year, identical legislation was approved by this committee by a vote of 13 to 5. That bill, S. 1765, was approved by the full Senate February 22, 1984, by a vote of 63 to 23.

It is clear from this chronology that the issue is ripe for action by this body. I propose that we squarely face our responsibility by approving the death penalty. It is clear that a substantial majority of the American people want us to adopt the death penalty. While I look forward to our discussion here of the issues presented by this bill, I am hopeful that we on this committee and in the Senate expeditiously comply with the wishes of our constituents and adopt procedures to implement the death sentence in our Federal criminal justice system.

99TH CONGRESS
1ST SESSION

# S. 239

To establish constitutional procedures for the imposition of the sentence of death, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 21), 1985

Mr. THURMOND (for himself, Mr. DECONCINI, Mr. EAST, Mr. GRASSLEY, Mr. HATCH, Mr. SIMPSON, Mr. SPECTER, Mr. ABDNOR, Mr. DOMENICI, Mr. HELMS, Mr. LONG, Mr. TRIBLE, Mr. DENTON, Mr. D'AMATO, Mr. JOHNSTON, and Mr. BOREN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To establish constitutional procedures for the imposition of the sentence of death, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That title 18 of the United States Code is amended—

(a) by adding the following new chapter after chapter 227:

"CHAPTER 228—DEATH SENTENCE

"Sec.
"3591. Sentence of death.
"3592. Factors to be considered in determining whether a sentence of death is justified.
"3593. Special hearing to determine whether a sentence of death is justified.
"3594. Imposition of a sentence of death.

"3595. Review of a sentence of death.
"3596. Implementation of a sentence of death.
"3597. Use of State facilities.

**"§ 3591. Sentence of death**

"A defendant who has been found guilty of—

"(a) an offense described in section 794 or section 2381 of this title;

"(b) an offense described in section 1751(c) of this title, if the offense constitutes an attempt to kill the President of the United States and results in bodily injury to the President or comes dangerously close to causing the death of the President; or

"(c) any other offense for which a sentence of death is provided, if the defendant—

"(1) intentionally killed the victim;

"(2) intentionally inflicted serious bodily injury that resulted in the death of the victim; or

"(3) intentionally participated in an act that he knew, or reasonably should have known, would create a grave risk of death to a person, other than one of the participants in the offense, and the victim died as a direct result of the act;

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified.

"§ 3592. Factors to be considered in determining whether a sentence of death is justified

"(a) MITIGATING FACTORS.—In determining whether a sentence of death is justified for any offense, the jury, or if there is no jury, the court, shall consider each of the following mitigating factors and determine which, if any, exist:

"(1) the defendant was less than eighteen years of age at the time of the offense;

"(2) the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution;

"(3) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; and

"(4) the defendant was an accomplice whose participation in the offense was relatively minor.

The jury, or if there is no jury, the court, may consider whether any other mitigating factor exists.

"(b) AGGRAVATING FACTORS FOR ESPIONAGE AND TREASON.—In determining whether a sentence of death is justified for an offense described in section 3591(a), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

"(1) the defendant has previously been convicted of another offense involving espionage or treason for

which either a sentence of life imprisonment or death was authorized by statute;

"(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; and

"(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

"(c) AGGRAVATING FACTORS FOR HOMICIDE AND FOR ATTEMPTED MURDER OF THE PRESIDENT.—In determining whether a sentence of death is justified for an offense described in section 3591 (b) or (c), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

"(1) the death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property in inter-

state commerce by explosives), section 1118 (prisoners serving life term), section 1201 (kidnaping), or section 2381 (treason) of this title, or section 902 (i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472 (i) or (n)) (aircraft piracy);

"(2) the defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

"(3) the defendant has previously been convicted of two or more Federal or State offenses, punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person;

"(4) the defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense;

"(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

"(6) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

"(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;

"(8) the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism; or

"(9) the defendant committed the offense against—

"(A) the President of the United States, the President-elect, the Vice President, the Vice-President-elect, the Vice-President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

"(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

"(C) a foreign official listed in section 1116(b)(3)(A) of this title, if he is in the United States on official business; or

"(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution—

"(i) while he is engaged in the performance of his official duties;

"(ii) because of the performance of his official duties; or

"(iii) because of his status as a public servant.

For purposes of this subparagraph, a 'law enforcement officer' is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution of an offense.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

**"§ 3593. Special hearing to determine whether a sentence of death is justified**

"(a) NOTICE BY THE GOVERNMENT.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, he shall, a reasonable time before the trial, or before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause, sign and file with the court, and serve on the defendant, a notice—

"(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter; and

"(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(b) HEARING BEFORE A COURT OR JURY.—If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. Prior to such a hearing, no presentence report shall be prepared by the United States Probation Service, notwithstanding the provisions of Rule 32(e) of the Federal Rules of Criminal Procedure. The hearing shall be conducted—

"(1) before the jury that determined the defendant's guilt;

"(2) before a jury impaneled for the purpose of the hearing if—

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury;

"(C) the jury that determined the defendant's guilt was discharged for good cause; or

"(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

"(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of twelve members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

"(c) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—At the hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial. Any other information relevant to a mitigating or aggravating factor may be presented by either the attorney for the government or the de-

fendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The attorney for the government shall open the argument. The defendant shall be permitted to reply. The attorney for the government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

"(d) RETURN OF SPECIAL FINDINGS.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return a special finding as to each mitigating and aggravating factor, concerning which information is presented at the hearing, required to be

considered under section 3592. The jury must find the existence of a mitigating or aggravating factor by a unanimous vote, although it is unnessary that there be a unanimous vote on any specific mitigating or aggravating factor if a majority of the jury finds the existence of such a specific factor.

"(e) RETURN OF A FINDING CONCERNING A SENTENCE OF DEATH.—If, in the case of—

"(1) an offense described in section 3591(a), an aggravating factor required to be considered under section 3592(b) is found to exist; or

"(2) an offense described in section 3591(b) or (c), an aggravating factor required to be considered under section 3592(c) is found to exist;

the jury, or if there is no jury, the court, shall then consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified.

"(f) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of

death is justified, it shall not consider the race, color, national origin, creed, or sex of the defendant. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, national origin, creed, or sex of the defendant was not involved in reaching the juror's individual decision.

**"§ 3594. Imposition of a sentence of death**

"Upon a finding under section 3593(e) that a sentence of death is justified, the court shall sentence the defendant to death. Upon a finding under section 3593(e) that a sentence of death is not justified, or under section 3593(d) that no aggravating factor required to be found exists, the court shall impose any sentence other than death that is authorized by law. Notwithstanding any other provision of law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without parole.

**"§ 3595. Review of a sentence of death**

"(a) APPEAL.—In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

"(b) REVIEW.—The court of appeals shall review the entire record in the case, including—

"(1) the evidence submitted during the trial;

"(2) the information submitted during the sentencing hearing;

"(3) the procedures employed in the sentencing hearing; and

"(4) the special findings returned under section 3593(d).

"(c) DECISION AND DISPOSITION.—

"(1) If the court of appeals determines that—

"(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

"(B) the information supports the special finding of the existence of an aggravating factor required to be considered under section 3592;

it shall affirm the sentence.

"(2) In any other case, the court of appeals shall remand the case for reconsideration under section 3593.

"(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

**"§ 3596. Implementation of a sentence of death**

"A person who has been sentenced to death pursuant to the provisions of this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does so provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law. A sentence of death shall not be carried out upon a woman while she is pregnant.

**"§ 3597. Use of State facilities**

"A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.";

(b) by repealing sections 3566 and 3567;

(c) in the chapter analysis of part II, by adding the following new item after the item relating to chapter 227:

"228. Death sentence ..... 3591";

and

(d) in the section analysis of chapter 227, by amending the items relating to sections 3566 and 3567 to read as follows:

"3566. Repealed.
"3567. Repealed.".

SEC. 2. Section 34 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

SEC. 3. Section 794(a) of title 18 of the United States Code is amended by changing the period at the end of the section to a comma and by adding immediately thereafter the words "except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.".

SEC. 4. Section 844(d) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

SEC. 5. Section 844(f) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

SEC. 6. Section 844(i) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

SEC. 7. The second paragraph of section 1111(b) of title 18 of the United States Code is amended to read as follows:

"Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;".

SEC. 8. Section 1116(a) of title 18 of the United States Code is amended by striking the words "any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and".

SEC. 9. Chapter 51 of title 18 of the United States Code is amended—

(a) by adding at the end thereof the following:

**§ 1118. Murder by a Federal prisoner**

"(a) Whoever, while confined in a Federal correctional institution under a sentence for a term of life imprisonment, murders another shall be punished by death or by life imprisonment without the possibility of parole.

"(b) For the purposes of this section—

"(1) 'Federal correctional institution' means any Federal prison, Federal correctional facility, Federal community program center, or Federal halfway house;

"(2) 'term of life imprisonment' means a sentence for the term of natural life, a sentence commuted to natural life, an indeterminate term of a minimum of at least fifteen years and a maximum of life, or an unexecuted sentence of death;

"(3) 'murders' means committing first degree or second degree murder as defined by section 1111 of this title."; and

(b) by amending the section analysis to add:

"1118. Murder by a Federal prisoner.".

SEC. 10. Section 1201 of title 18 of the United States Code is amended by inserting after the words "or for life" in subsection (a) the words "and, if the death of any person results, shall be punished by death or life imprisonment".

SEC. 11. The last paragraph of section 1716 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the paragraph.

SEC. 12. Subsection (c) of section 1751 of title 18 of the United States Code is amended to read as follows:

"(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished

(1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if the conduct constitutes an attempt to kill the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President.".

SEC. 13. The second to the last paragraph of section 1992 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

SEC. 14. Section 2031 of title 18 of the United States Code is amended by deleting the words "death, or".

SEC. 15. Section 2113(e) of title 18 of the United States Code is amended by striking the words "or punished by death if the verdict of the jury shall so direct" and inserting in lieu thereof the words "or if death results shall be punished by death or life imprisonment".

SEC. 16. Section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), is amended by striking subsection (c).

SEC. 17. The provisions of chapter 228 of title 18 of the United States Code, as added by this Act, shall not apply to prosecutions under the Uniform Code of Military Justice (10 U.S.C. 801).

The CHAIRMAN. I notice that Senator Levin is here.
Senator, we would be glad to hear from you.

## STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Mr. Chairman, first let me thank you and the other members of the committee for scheduling this at a time which does not conflict with a religious holiday which would have prevented some of us from being here and testifying or otherwise participating.

It was good of you to make that adjustment not too many days ago.

Mr. Chairman, you will be hearing and have heard, indeed over the years, from people who both oppose and support capital punishment.

I think they have one thing in common, at least, whether you oppose capital punishment or you support it and that is that we all equally share the horror and the anger toward those persons who commit violent crimes.

There is no difference in the degree of anger or horror that we feel about persons who commit violent crime. The differences have to do with the efficacy and the usefulness and the morality of the death penalty.

One primary reason that I have opposed the death penalty has to do with the possibility of mistake, and that is what I would like to focus on.

There are other witnesses who will talk about the absence of a deterrent effect. As a matter of fact, States that have the death penalty have a higher murder rate than States that do not have capital punishment.

But in any event, I want to focus on the question of mistake, because I have had some personal experience with mistake and I want to speak to this committee out of my personal experience.

I have represented people on appeal, many, many years after they served time in prison and they were innocent of the crime for which they were convicted—capital offenses.

If Michigan had the death penalty they would not have been around to represent. They could not walk out of prison 30 years later, free people, innocent, totally innocent in this case, of the crime for which they were convicted.

The man I happened to represent, he was one of two defendants actually, was a man by the name of Charles Clark, who in 1937, was convicted of murder based on the eyewitness testimony of a young woman. This young woman was asked during her trial whether or not she was sure that Charles Clark was the man that stood behind her in her father's store, in when her father was gunned down, a small businessperson, a small town inside Detroit, called Hamtramck.

He was a man who worked hard for a living and scraped it together. We would all support his endeavor pursuing the American dream. This man was gunned down during a robbery and his young daughter witnessed that robbery and was the only person who picked out the defendant, Charles Clark.

Charles Clark refused a number of commutations of his sentence by various Governors. He felt that he wanted to walk out of prison an innocent man if he was going to walk out at all, because he always proclaimed his innocence, saying that he was no where near the store in question at the time.

The case came to our attention when I was with the defender's office, in Detroit, head of the appellate section. One of our investigators went out to try to find that young woman, now 30 years later. When our investigation found her she testified very openly and forthrightly to him about it, that the reason that she had pointed out this man was because the detective had told her that this man was, indeed, the person who killed her father.

That power of suggestion on the part of the detective, that she related very openly 30 years later, is the reason, and the only reason that she identified Charles Clark. The detective had told her that that was the man who had killed her father.

Putting aside the facts in that case, the bottom line is about 30 years after he started to serve a sentence for a crime that he did not commit, a capital offense, based on a new affidavit now, of that young woman, no longer so young, Charles Clark walked out a free man.

That is not an unusual case. There are miscarriages of justice; innocent people are convicted and innocent people have been put to death.

We have outlined in the record, when this matter came up before, a long series of mistakes in capital offenses.

Senator Metzenbaum inserted into the record, for the Senate's consideration, one long series of judicial and juror errors in convicting people for crimes for which they were not guilty and I also described numerous such cases.

I want to spend just a few minutes today on some new cases, cases that have occurred since we testified here last, in 1981.

Again, I am not going to spend my time on the question of deterrence. Others will cover that. I want to just insert for the record a number of cases that have occurred in the last few years, where innocent people have been convicted of capital offenses.

In some cases, these people were on death row, only a few hours away from being executed.

New York Times, April 28, 1985: Story dateline: Houston.

A judge reversed a murder conviction Friday after he said new evidence proved the convicted man could not have committed the crime. The Judge, Michael McSpadden, of the State District Court, ordered the release of the man, Pedro Torres, 37 years old who was convicted by a jury in March and sentenced to 75 years in prison.

St. Louis Post Dispatch, October 14, 1983.

Melvin Lee Reynolds sentenced to life imprisonment for one of the most shocking murders in the history of St. Joseph's, Missouri, took his first step to freedom today, after another man confessed to committing the crime. Reynolds who had insisted for the last 4 years that police forced him to confess the crime, left the Missouri State Penitentiary about 7:30 a.m. this morning.

Next, Chicago Tribune, March 6, 1981.

San Quentin, California, Arron Owens will walk out of San Quentin Prison in a few days after 9 years behind bars for a double-murder that he did not commit—sprung, ironically, by the former Deputy District Attorney who prosecuted him 8

years ago. The real killer, who bore remarkable resemblance to Owens, remains at large.

The story of Owens' wrongful conviction for two open California shotgun murders finally emerged Wednesday at a hearing before a Board of Prison Terms Panel.

Mr. Chairman and members of this committee, if Mr. Owens had been executed there would not have been a hearing before the Board of Prison Terms at San Quentin.

October 20, 1982, Boston Globe.

A 30-year-old Roxbury man who was sentenced to death and who spent 10 years in prison for a murder he said that he did not commit was freed yesterday in Massachusetts Superior Court of all charges against him. All charges against Lawyer Johnson of Dorr Street, Roxbury, were dismissed based on new evidence from a witness to a 1971 murder who now says that Johnson was not the guilty man.

That is 11 years earlier.

Detroit News, February 3, 1984.

After hearing "new evidence" developed by Pontiac Police Detectives, a Louisiana man, sentenced to die in the electric chair, was granted a stay of execution by a Federal Magistrate, New Orleans.

Ronald Monroe, 29, was convicted and sentenced to death for killing a neighbor and stabbing her 13-year old daughter in New Orleans in 1977.

On and on they go.

Southern Poverty Law Center Journal, January 1982, talks about Johnny Ross, free, cleared at last of the rape charge that nearly led to his execution. Released just before Christmas after they developed proof of his innocence; $1 million was awarded to a man wrongfully imprisoned 24 years. That is in the New York Times June 1, 1983.

A Queens man who spent 24 years in New York Prison for a murder that State officials have since conceded that he did not commit, and awarded him $1 million in compensation today. The State Court of Claims. The man, Isodore Zimmerman, came within hours of being executed 1939.

New York Times, February 25, 1984: Editorial talking about Larry Dean Smith who was sentenced to die by lethal injection.

Not until his case reached the Supreme Court last fall, did the State's Attorney concede that the execution seemed to him unwarranted. Now, the Oklahoma Courts have altogether dismissed the murder indictment.

I would ask that a number of articles relative to errors in capital cases be inserted into the record at this time.

[The articles follow:]

[The New York Times, Apr. 28, 1985]

JUDGE FREES A MAN WRONGLY CONVICTED OF MURDER

HOUSTON, April 27 (AP)—A judge reversed a murder conviction Friday after he said new evidence proved the convicted man could not have committed the crime.

The judge, Michael McSpadden of State District Court, ordered the release of the man, Pedro Torres, 37 years old, who was convicted by a jury in March and sentenced to 75 years in prison.

Judge McSpadden said records produced in court Friday showed that Mr. Torres, an alien in this country illegally, was working in Dallas when the victim, 18-year-old Manuel Ortega, was stabbed to death here last April. Mr. Torres had spent six months in jail after being charged with the murder.

Mr. Torres' trouble started when he was picked up for drinking beer at a Dallas convenience store, which is against the law. The police ran a check on Mr. Torres through a Texas Department of Public Safety computer, which showed that a Pedro Torres was wanted for Mr. Ortega's murder, Judge McSpadden said.

"WE HAD THE WRONG PERSON"

Mr. Torres told the police and his lawyer that he was employed as a laborer at an iron works in Dallas and had been there at the time of the slaying, Judge McSpadden said. But his attorney did not present his work records at the trial, the judge said.

"I told the defense attorney to file a motion for a new trial because I wanted to see the work records," Judge McSpadden said. "The motion was filed and based upon the new facts, I knew we had the wrong person."

The evidence presented at the new trial showed Mr. Torres had been on the job in Dallas when the murder was committed April 17, 1983, in Houston, 250 miles away, according to the judge. A new witness was also produced who was the roommate of the other Pedro Torres, the judge said, and it was established that it was this Torres being sought. He is still at large, Judge McSpadden said.

The judge said he understood the jury's verdict considering the facts brought out in the trial.

Mr. Torres' lawyer, Carlos Garcia, was out of his office Friday and he did not return the messages left for him.

Judge McSpadden said he was giving Mr. Torres a document to carry in his wallet. Without the document, the judge said, "If he gets caught again and his name is run through the computer, they'll bring him in again.

The judge said he did not know if the Immigration and Naturalization Service would try to deport Mr. Torres as an illegal alien. Immigration officials could not be reached over the weekend.

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[From the St. Louis Post-Dispatch, Oct. 14, 1983]

CONFESSION: WRONG MAN IMPRISONED

(By Terry Ganey)

JEFFERSON CITY.—Melvin Lee Reynolds, sentenced to life imprisonment for one of the most shocking murders in the history of St. Joseph, Mo., took his first step to freedom today after another confessed to committing the crime.

Reynolds, who had insisted for the last four years that police forced him to confess to the crime, left the Missouri State Penitentiary about 7:30 a.m. for an appearance in Buchanan County Circuit Court. The appearance is a requirement of the legal process needed to set Reynolds free.

The court is the same one where Reynolds was convicted in 1979 for the sexual attack and murder of 4-year-old Eric Christgen. The jury that convicted him and the Missouri Supreme Court, which later turned down his appeal, did not believe his story that the confession had been coerced by police.

But on Thursday, Charles Hatcher, 54, announced in Buchanan County Circuit Court that he had committed the murder, setting the stage for Reynolds' release.

"All this is too good for me to be true, but I'm glad it is," Reynolds, 28, said Thursday in an interview at the prison. "Ever since my mother told me (about Hatcher's confession), nothing gets me depressed in here anymore. I've had nothing but happy thoughts."

Hatcher is facing capital murder charges in the killing of another youngster in St. Joseph. He rocked the city and its Police Department when he made his admission before Judge Frank B. Connett Jr., who had presided over Reynolds' trial in 1979.

"I did take the boy, and I did kill," Hatcher said. "I don't know why I did it."

Prosecuting attorney Michael Insco of Buchanan County said the details of Hatcher's written confession had left no doubt that he was the man who had abducted the child at a shopping mall May 26, 1978, sexually abused him and then strangled him.

After Hatcher entered his plea and waived further legal proceedings, Judge Connett sentenced him to life imprisonment.

Insco said Thursday that the Christgen murder case was closed and that Reynolds could be released. Hatcher still faces the death penalty in the murder last year of Michelle Steele, 11, a crime he denies committing.

Reynolds has said he had made his confession after marathon interrogation sessions that often lasted several hours. He recalled one that went from 8 a.m. until 1:30 a.m.

"They let me get a cup of coffee during that whole time," he said. "I was so scared, I wasn't even hungry."

He said he had confessed to end the constant harassment.

"Every person has a breaking point, and I went past mine," he said. "I told them if they wanted a confession, I'd do it. I was getting to the point where I was tired."

The case of Reynolds was not the only one in which the authorities' interrogation techniques were questioned. Before Reynolds made his confession, 64-year-old Harry Fox died of a heart attack during police questioning in the case. For 23 years, Fox had operated an elevator at a building in downtown St. Joseph, near where the Christgen boy was last seen. Fox was brought in for questioning as a possible witness.

Fox had been brought in for questioning June 5, 1978, according to police reports. He was questioned beginning at 8:17 p.m., became ill at 9 p.m. and was pronounced dead of a heart attack at a St. Joseph Hospital at 10:19 p.m.

A relative of Fox later said Fox was "scared to death" by the questioning.

Reynolds recanted his confession on the witness stand during his trial. But the jury convicted him of second-degree murder. Judge Connett sentenced him to life imprisonment. In September 1981, the state Supreme Court upheld the conviction and sentencing, rejecting Reynolds' arguments he had been coerced by police into giving the tape-recorded statement played at his trial.

"I have sat back and thought, if I wouldn't have made that confession, I wouldn't be here," Reynolds said. "That was the hardest evidence they had."

Reynolds said he had been subjected to threats of physical abuse at the penitentiary because of the nature of the crime he was convicted of and had been forced into homosexual acts.

"This is a whole different world," he said. He said that he had been "gay since I was 20," but that he had led a normal life during the year preceding his arrest.

Reynolds said he did not plan to initiate any suits alleging wrongful prosecution against authorities in St. Joseph.

"I just want my freedom," he said. "My freedom means a hell of a lot more to me than some suit."

The Christgen boy, the son of a wood products businessman, disappeared from the mall after his father's secretary left him alone for a few minutes. The woman, who was acting as a baby sitter, went inside a store. The boy's body was found the next day in a heavily wooded area in northwest St. Joseph.

Reynolds said he planned to rebuild his life in St. Joseph, living with his mother and stepfather.

The possibility of his release became apparent three months ago, when Hatcher wrote a letter of confession to the FBI from his cell in the St. Louis County Jail. Hatcher was facing first-degree murder charges in the death of the Steele girl, whose body was found along the Missouri River. On a change of venue, Hatcher was to stand trial on the charges in St. Louis County Circuit Court.

On July 25, Hatcher wrote the FBI, with details in the killing of the Christgen boy. The trial in St. Louis County was never held because authorities, refiled charges against Hatcher, accusing him of capital murder. He is now scheduled to go to trial on the new charges in January in St. Joseph.

FBI agent Joseph Holtslag testified Thursday in Buchanan County Circuit Court that Hatcher had told him he confessed to help Reynolds. In the interview, Reynolds said he did not know Hatcher and never had heard of him.

Holstag said that Hatcher had lived at the St. Charles Hotel in St. Joseph from April to June 1978 and that he had provided "very detailed and very accurate" information on the Christgen murder that could not have been obtained by the public.

I squeezed hard enough to cut off his air," Holstag quoted Hatcher as saying in a description of the boy's murder.

While Insco, the prosecuting attorney, said Thursday that the Christgen murder case was closed and that Reynolds could be released, St. Joseph Police Chief James R. Hayes disputed that conclusion. Hayes said Hatcher's written confession had six discrepancies, including the claim that the murder had occurred through strangulation. Hayes said a pathologist had found that the youth suffocated during the sexual abuse.

"We are appalled that the Missouri Highway Patrol and the St. Joseph police were not really involved, and feel we have been circumvented in what I assume will be the final solution to this case," Hayes said.

[From the Chicago Tribune, Mar. 6, 1981]

## Innocent of Two Killings, "Wrong Man" To Go Free

San Quentin, Cal. (UPI)—Aaron Owens will walk out of San Quentin Prison in a few days after nine years behind bars for a double-murder he didn't commit—sprung, ironically, by the former deputy district attorney who prosecuted him eight years ago.

The real killer, who bore a remarkable resemblance to Owens, remains at large.

The story of Owens' wrongful conviction for two Oakland, Cal., shotgun murders finally emerged Wednesday at a hearing before a Board of Prison Terms panel.

Still wearing the mutton-chop sideburns he had when he was convicted, Owens, now 37, sat silently as Don Whyte, assistant Alameda County district attorney, told the panel that Owens will be free by "early next week at the latest."

Whyte told the panel that Owens will be taken before Alameda County Superior Court Judge Alan Lindsay, the judge at his original trial, and a formal request will be made to set aside Owens' life sentence and to dismiss the charges against him.

"I could never believe this happened to me," Owens said after the hearing.

"The same man who prosecuted me is the only one who would listen to me," he said, referring to former Deputy District Attorney John Taylor. Owens finally convinced Taylor during a parole hearing last November that he was innocent.

"Sure, I'm bitter at the system," Owens said, "but I'm not going to let it distort my thinking."

He said he plans to spend a lot of time with his two daughters in Richmond, Cal. "They were only 5 and 6 when I was sent to prison, and now they're 13 and 14."

Owens and a co-defendant, Glen Bailey, were convicted of two counts of first-degree murder for the slayings of Marie Collins and Stanley Bryant at an Oakland home on May 13, 1972.

One witness, a friend of one of the victims, identified Owens as one of the killers.

But Whyte told the panel Wednesday that a careful investigation by the district attorney's office determined that another man with a remarkable resemblance to Owens was Bailey's companion.

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[From the Boston Globe, Oct. 20, 1982]

## Murder Charge Dropped, He's Free Man Again

(By Betsy A. Lehman and Joseph M. Harvey)

A 30-year-old Roxbury man who was sentenced to death and who spent 10 years in prison for a murder he said he did not commit was freed yesterday in Massachusetts Superior Court.

All charges against Lawyer Johnson of Dorr Street, Roxbury, were dismissed, based on new evidence from a witness to a 1971 murder who now says that Johnson was not the guilty man. The witness who was 10 years old when the murder was committed, says the real killer was the man who testified against Johnson in two previous trials.

Shortly before noon yesterday, Massachusetts Superior Court Judge James P. McGuire accepted the recommendation of Asst. Dist. Atty. Thomas J. Mundy that charges against Johnson, who was facing a third trial in the murder of James Christian, 30, of Chelsea, be dismissed. The third trial was ordered after the new witness came forward in 1981.

Kenneth Meyers, the man who previously identified Johnson as the killer, is now serving a long sentence in Walpole state prison for robbery and refuses to testify again. Without his testimony, the prosecution had no case.

Dawnielle Montiero, a neighbor in the Mission Hill project, has said she saw Meyers shoot Christian but was afraid to say so. Mundy has contended that the long delay before Montiero's testimony and her friendship with Johnson raised doubts about the reliability of her testimony.

Christian, a reported drug addict, was shot twice in the face as he came out of the doorway of a Mission Hill public housing project on Prentiss Street on Dec. 17, 1971. Johnson has said all along that he was not at the scene, but in two trials could not prove it.

The first trial, in 1972, resulted in Johnson's conviction for first degree murder and Judge Wilfred J. Paquet ordering the mandatory death sentence. On appeal, the Supreme Judicial Court set aside the conviction and sentence in 1974 because

Meyers the principal prosecution witness had been allowed to withhold the identities of two alleged witnesses to the shooting.

A second trial in November 1974, at which Meyers again identified Johnson as the killer, ended in a second degree murder conviction with a mandatory life sentence.

In 10 years, Johnson has been incarcerated at the Walpole, Norfolk and Concord correctional institutions.

In an interview yesterday in his mother's house, where he has lived since he was released in February on bail, Johnson said that "anger destroys," but still he is bitter about the legal system that twice convicted him, once to death, and once to life in prison. He accused prosecutors of manipulating both the jury and the testimony because they cared only about getting a conviction, not about the truth.

"It was a legal lynching," he said. The prosecution, he said, "fabricated and conspired" with Meyers. Both juries were all white the murder victim was white, too, and Johnson, who is black, said the racial fears of the jurors were played on by the prosecution.

"I totally believed in the system of justice," he said, "My faith in the system is gone."

(Mundy, who was also the prosecutor in the original case, yesterday called Johnson's release a "travesty of justice."

("We reluctantly dismissed the indictment because of the age of the case and the unavailability of witnesses," Mundy told The Associated Press.)

Johnson said he has little interest in voting, doesn't really feel "part of the crowd," yet, but opposes capital punishment. "Two wrongs don't make a right," he said.

In prison, Johnson learned to paint, cook and to be a barber. He is enrolled in a beauty academy now to learn to be a hairdresser. He hopes the hairdressing will support him until he can make it as a serious artist. Art is his passion, the one part of his life in which he said he feels complete confidence.

Perhaps most of all, however, Lawyer Johnson learned in prison to rely on no one but himself, he said.

"I am like an atom," he said intently, "that has direction entirely of its own. I don't like to be attached."

Maintaining aloofness from the depression and violence of prison and thinking of himself as an observer, said Johnson, got him through the last 10 years. Sometimes he fasted for a week at a time, just to improve his willpower, he said. He found he had to make something in his cell that would make the bars and cement slab walls disappear from his consciousness, he said.

"I thought, what can I do? It had to be something creative, supporting, life-giving," said Johnson, a tall, reed-thin man with closecropped hair. "Art was a form of escapism."

Johnson said he learned how to paint and got his first supplies from the nonprofit Masschusetts Prison Art Project. From then on, nearly every day, he stroked brilliant colors of acrylic paint onto canvas. He said he visualized scenes outside the prison walls and painted them.

He has had paintings in some 15 art shows, and has won several prizes. Some artists have told Johnson his work looks like that of Kandinsky. Johnson, who read everything he could about art in prison libraries, said he had never even heard of Kandinsky before.

One of his favorite paintings, called "Atom," shows a single black figure in an overwhelming, animated abstract jungle.

Michael Fields, a spokesman for the Campaign Against Restoration of the Death Penalty, said Johnson's case, "is another illustration of the injustice of the death penalty. If he had been executed, these new developments would not have done him much good," Fields said.

Johnson's lawyer Michael Avery of Boston said, "if he had been executed in 1972 we would have lost some of the beautiful art he has created."

[Feb. 3, 1984]

## Pontiac "Evidence" Saves Man From Electric Chair

(By Mike Martindale)

After hearing "new evidence" developed by Pontiac police detectives, a Louisiana man, sentenced to die in an electric chair, was granted a stay of execution by a federal magistrate in New Orleans.

Ronald S. Monroe, 29, was convicted and sentenced to death for killing a neighbor and stabbing her 13-year-old daughter in New Orleans in 1977.

But U.S. Magistrate Marcel Livaudias Jr. ruled yesterday that Monroe's constitutional rights were violated when his defense was not informed that a man once imprisoned in the Oakland County Jail may have claimed to have killed the woman.

The Federal ruling came three days after a hearing on a defense claim that Louisiana law enforcement officials had suppressed information that George Stinson, 26, may have confessed while in the Oakland jail to killing the woman.

Monroe was scheduled to die in the electric chair on Jan. 5, before this latest appeal intervened.

Monroe of New Orleans was convicted of breaking into the bedroom of Lenora Collins on the night of Jan. 26, 1978, and stabbing her to death. Her daughter said that when she tried to stop him he also stabbed her.

Both the daughter and her 14-year-old brother, who also saw his mother slain, identified Monroe as the attacker. He lived in the other half of the double house occupied by Mrs Collins.

But a Pontiac policeman testified this week in New Orleans that a former cellmate of Stinson, Francis McWilliams, swore that Stinson confessed to killing Mrs. Collins. Stinson, who has been convicted of murdering his wife, once lived with Mrs. Collins.

Stinson now is serving a 10-to-20-year sentence in Jackson State Prison.

McWilliams insisted that when he asked Stinson what happened to Mrs. Collins, Stinson replied: "The same thing that happened to this one, meaning his own wife," Monroe's lawyer contended in court this week.

But Stinson testified on Monday in New Orleans that he did not mean that he had killed Mrs. Collins, only that Mrs. Collins had been stabbed to death.

After McWilliams' report three years ago, Joseph Gallardo, a Pontiac police detective, testified that he immediately gave the information to New Orleans police, but detectives who handled the case and the district attorney's office said they never got word of the alleged confession.

However, the federal magistrate apparently believed Gallardo had passed on the alleged confession to New Orleans authorities.

Livaudias granted a writ of habeus corpus ordering "that the court issue whatever orders be deemed appropriate."

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[From Southern Poverty Law Center, Feb. 17, 1982]

## Once Youngest on Death Row: Johnny Ross Proven Innocent, Set Free

New Orleans.—Johnny Ross is free, cleared at last of the rape charge that nearly led to his execution, and bringing to a happy end one of the Southern Poverty Law Center's most celebrated and frustrating cases.

He was released just before Christmas, after Center attorneys developed scientific proof of his innocence, evidence that, tragically, was available and should have been introduced at his trial in 1975.

The proof was a simple blood test indicating that Ross' blood type and the rapist's, which had been determined from a sample of seminal fluid taken from the rape scene, were different. Thus Johnny Ross could not possible have been guilty.

Presented with this irrefutable evidence, the New Orleans District Attorney's Office, which had sought Ross' execution in 1975, now agreed to his release, and on Dec. 15 he walked out of Angola Prison and into the embrace of his mother and aunt.

It was the culmination of more than five years of work by SPLC attorneys and was the ultimate vindication for Ross, who all along had vigorously maintained his innocence.

"Please believe that I didn't do this neither did I have any thing to do with it," Ross wrote to the Center in a desperate plea for help in 1975. "Only if I had someone to hold my hand and walk with me I know I will make it."

At the time, Ross was 16 and the youngest person on death row in the country, and the Center was preparing to commit its resources to the fight against capital punishment in light of anticipated legal developments that would bring back the death penalty.

Center attorneys accepted Ross' case, convinced after only a preliminary investigation that he had not received a fair trial. But before their appeal of his death sentence was ruled on in the Louisiana courts, the U.S. Supreme Court, in another case, struck down the capital punishment statute under which he had been sentenced. That law provided for the death penalty in rape cases even if, as in Ross' case, the victim had not been killed.

Despite being out from under the death sentence, Ross continued to be housed in his tiny death row cell and denied the privileges of prisoners in the general population for the best part of a year, until the Louisiana Supreme Court ordered him resentenced in mid-1977 to 20 years in prison. SPLC Legal Director John Carroll appealed the new sentence.

It was not until early 1980, however, that things began to happen in the case, as Carroll moved the Ross appeal into the federal court system, filing a habeas corpus petition in the United States District Court in New Orleans.

Carroll sought and was granted permission to conduct "discovery" in the case in an effort to find out the answers to a number of basic questions about Ross' arrest and prosecution.

The 1975 trial had been so brief—it had taken less than a day, though Ross' life was at stake—that even such basic facts as how Ross had come to be considered by the police to be a suspect in the rape did not come out during testimony.

Carroll took depositions, interviewed witnesses and pored over hundreds of pages of court documents related to the case, and soon the extent of the injustice inflicted on Johnny Ross—the unfairness of his trial—became apparent.

Ross, who is black, was arrested for the rape of a young white woman who was a federal law enforcement officer. The attack happened one night in St. Bernard Parish, adjacent to New Orleans, and was carried out by two young black men who abducted the woman, drove her in her own car into New Orleans, raped her at gunpoint, and returned her to the site of the abduction.

St. Bernard Parish police, who had staked out the area after an eyewitness reported the kidnapping, moved in to capture the suspects, but the abductors managed to drive off before being apprehended and a high-speed chase and gun battle all the way back to New Orleans ensued. Ultimately, the men escaped.

After viewing photographs of suspects, the victim made a positive identification of a young man named Earl Lewis, and so the police set out to arrest him. They said he pointed a gun at them and he fled and that they had to shoot, and Lewis died of a gun-shot wound in the head. Curiously, the path of the bullet that entered Lewis' head led downward in a peculiar trajectory, as if he'd been shot from above.

When the officers questioned Lewis' relatives, so the police account goes, they named Johnny Ross as his accomplice, and so late one night, a week after the rape, the police broke into Ross' house in a New Orleans slum and arrested him after first mistakenly trying to take his brother.

Ross was taken to the police station and after several hours he confessed, but only, he says, because he was beaten.

Similar cause for skepticism surrounded the victim's identification of Ross as the rapist, another crucial piece of evidence at trial. During a pretrial lineup, the victim failed to pick out Ross as her assailant, but a brief conference with the police followed, whereupon she was shown a photographic array of suspects. Of the men she had just viewed in the live lineup, only Ross was also displayed in the photographic spread, and afterward she put the finger on him, her trial testimony was based on this identification.

One last piece of evidence used against Ross at the trial was a thumb-print, identified as his, that allegedly was taken off a window of the victim's car. But there is reason to think that the fingerprint, based on its appearance, may actually have been a "plant."

So Ross went to trial and was his only witness. His attorney, who had met with him just once, failed to contact persons Ross said could vouch for his whereabouts the night of the rape, and after only a few minutes of deliberation, the jury found him guilty. He subsequently was sentenced to death.

Carroll looked at the case and felt there were solid grounds for appeal; the confession, taken from a juvenile without the benefit of the advice of a lawyer or some independent adult; the victim's identification, which seemed to have been suggested; and the effectiveness of Ross' legal representation.

But there was still things to be found out, and Carroll, joined now by staff attorney Ira Burnim, hired Gary Eldredge, a local private investigator, to complete the investigation for the habeas corpus petition.

Eldredge read the trial transcript and began tracking down alibi witnesses, interviewing investigating officers and pursuing other leads. In reading the transcript, he noticed that the prosecutor had introduced through the testimony of a criminalist, the rapist's blood type, as determined from a semen sample taken from the rape scene, but the prosecutor had never tied this piece of evidence to Ross.

For the sake of thoroughness Eldredge decided to check it out and contacted Ross to see if he knew his blood type. The rapist's was the "B" group. Ross didn't know his, but told Eldredge he had donated blood a number of times since he'd been imprisoned. So Eldredge contacted the blood bank that served the prison.

Each of the numerous times Ross had donated, his blood had been typed, and each time it had come up "O+". But these were the results of testing by technicians, not physicians, so after informing Carroll of his findings, Eldredge arranged for a prominent university doctor to test Ross, and his tests produced exactly the same results.

A check of official records revealed Earl Lewis' blood type was "A", which meant that the deceased youth, shot down by the police, was not the rapist, either.

Carroll and Burnim now had hard proof exonerating not only Johnny Ross, but Earl Lewis, as well, and Burnim took the evidence to the district attorney's office. Soon thereafter, Ross was released. He is now living with his sister in Denver.

"Johnny's exoneration and release is an occasion for great happiness," Carroll said, "but it is also a time for sober reflection on the innocent men and women who have been executed in this country and on the inadequacy of our system to make such life-and-death judgments."

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[From the New York Times, June 1, 1983]

## One Million Is Awarded to Man Wrongly Imprisoned 24 Years

(By E.R. Shipp)

A Queens man who spent 24 years in New York prisons for a murder state officials have since conceded he did not commit was awarded $1 million in compensation yesterday by the State Court of Claims.

But the man, Isidore Zimmerman, who came within hours in 1939 of being executed, said he was "very unhappy" that the judge, Joseph Modugno, rejected his claim for $10 million.

"I should have gotten much more because what I sacrificed can never be replaced," said Mr. Zimmerman, a 66-year-old retired doorman.

### NO CAREER AND NO CHILDREN

He said that several members of his family had died before he was able to clear his name, that he had not been able to pursue a career, that his health had suffered and that he had had no children.

In a 10-page decision, Judge Modugno noted that Mr. Zimmerman "testified in detail as to his suffering, his severe beatings and long periods of solitary confinement in 'strip cells' where he was kept on a diet of bread and water in a room with limited sleeping and toilet facilities."

The judge concluded: "Based on all the evidence in the record and 120 exhibits, the court has determined that an award in the sum of $1 million would be fair and reasonable."

This, he said, is sufficient to cover all claims, "including loss of earnings, medical expenses, loss of liberty and civil rights, loss of reputation and mental anguish."

Both Mr. Zimmerman and the state gave indications that there might not be an appeal. The two sides have 30 days to decide.

Mr. Zimmerman's lawyer, Alfred Fabricant, noted that if he appealed, there was the chance the award would be reduced. Mr. Zimmerman, who is in poor health, also indicated he needed money now.

"I have no means to live on anymore," he said.

David M. Fishlow, a spokesman for Attorney General Robert Abramas, pointed out that Mr. Abrams had pushed for the legislation that made it possible for Mr. Zimmerman to sue the state.

"The only issue was the amount of the state's liability," Mr. Fishlow said. "He asked for $10 million. Attorney General Abrams, on behalf of the state, felt that was excessive."

In 1937, Mr. Zimmerman, then 20, was one of seven young men charged with taking part in the robbery of a Lower East Side restaurant during which a police officer was killed. Convicted of first-degree murder, he spent nine months on death row. Two hours before he was scheduled to be executed, Gov. Herbert H. Lehman commuted the sentence to life in prison.

PERJURED TESTIMONY WAS USED

In 1962, the State Court of Appeals overturned his conviction on the grounds that a prosecutor in the office of Thomas E. Dewey, the Manhattan District Attorney, had deliberately used perjured testimony and had suppressed evidence that might have proved Mr. Zimmerman's innocence.

Though Mr. Zimmerman indicated his disappointment at the award, he showed a sense of humor that had many reporters chuckling during a news conference.

"I plan to take a world cruise with my wife," he said, and added with a laugh, "although I might leave her behind somewhere."

Although the award would be tax-free, Mr. Fabricant's firm, Shea & Gould, would get about a third of it for legal fees. Mr. Zimmerman said he also had other expenses.

"If I get half a million," said Mr. Zimmerman, "that a lot."

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[Feb. 25, 1984]

EXECUTIONERS CAN'T BE ALMOST SURE

Capital punishment's singular feature is its finality. That's what a majority of senators said they liked when they reenacted a death penalty for certain Federal crimes this week. But what if it develops that the executed person was innocent?

That hardly ever happens, say the advocates of state-sponsored death. Well, it came close to happening in Oklahoma over the last year. Larry Dean Smith, 25 years old, was sentenced to die by lethal injection. Not until his case reached the Supreme Court last fall did the state's Attorney General, Michael Turpen, concede that execution seemed to him unwarranted. Now the Oklahoma courts have altogether dismissed his murder indictment.

Mr. Turpen, who has taken much heat for his fidelity to oath, alerted the high court to the absence of any evidence that the condemned man actually intended to kill Willard Denning, who died in a burning truck at a rural dump. There was thus no evidence of murder, let alone one justifying execution.

Oklahomans gave due credit to the persuasive petition on Mr. Smith's behalf drafted by Ursula Benetele and her students at the Brooklyn Law School; they studied the case as a class at the behest of the NAACP Legal Defense Fund. But the Supreme Court, which is expediting death sentences these days, would surely not have ruled for Mr. Smith if the state's top prosecutor had not confessed error.

Perhaps a Federal judge somewhere would have discovered the hole in the evidence? Yes, perhaps. But the same Senate that passed the Federal death bill also voted to restrict Federal court reviews of state criminal cases to the narrow question of whether a "full and fair hearing" has occurred. Never mind the quality of the judgment.

A civilized society should recognize the death penalty not only as extreme but irretrievable. Yes, it hardly ever happens that an innocent person is executed. It should never happen.

Senator LEVIN. Mr. Chairman, mistakes are not new, and they have occurred and always will occur. A system of justice that is operated by fallible human beings is not perfect, and we make mistakes.

The crimes that we all read about—and some of us have been touched by them, are horrendous crimes, crimes of violence.

There is no doubt about the horrors that we have inflicted upon us in this society, and I guess, in every society.

The question is, we want to respond to that with a system of justice which is fallible, which nonetheless inflicts the death penalty?

One of the most famous errors, by the way, happened a little over 100 years ago, in this town. It involved the Lincoln assassins, and it involved also the impeachment trial of President Johnson.

It is a little known anecdote, which has to do with an error in a criminal case. According to the American Bar Journal of June 1985—

> The reason that Johnson was impeached was because he fired Stanton, his Secretary of War, because Stanton had not shown him the recommendations for mercy of the panel that convicted Mary Surratt.

She was one of the conspirators allegedly, who was convicted in front of a panel, sentenced to death, and that panel had delivered to Stanton the recommendation for mercy which had never gotten to President Johnson.

President Johnson, when he found out about that, 2 years later, fired Stanton and that act led to the impeachment of a President of the United States.

A footnote in history, a mistake in a capital case—error, purposeful or negligent—who will know, but nonetheless an error in a capital case led to the only impeachment that we have ever had of a President of the United States.

Mr. Chairman, I do have a more detailed and complete statement and I would ask that that statement be made a part of the record.

Again, I commend the chairman and the members of this committee for holding these hearings. I believe they are the first on this subject since 1981.

And again, my thanks to the chairman for scheduling this at a time when it would be possible for a number of us to be here who otherwise could not be.

The CHAIRMAN. Senator, we are glad to have you.

As I construe your position, you are not in favor of capital punishment at all?

Senator LEVIN. That is correct.

The CHAIRMAN. It is a very serious question. Some crimes are so heinous and serious that I wonder if we should not have capital punishment on the books and leave it to the jurors who hear the facts to determine whether a man found guilty should get capital punishment or life imprisonment.

You remember the *Stephanie Roper* case up here, do you not?

I just want to read you a paragraph here from her mother's statement.

This is by Mrs. Roper:

> On April 3, 1982, our daughter, Stephanie became a victim in Maryland, a State that ranks fourth in this Nation in violent crime. She was kidnapped, brutally and repeatedly raped. She was tortured. She was shot to death. Her body was burned and mutilated to prevent identification. Her murderers were convicted of first degree murder, felony murder, first degree rape and kidnapping. They were given sentences that make them eligible, however, for parole in less than 12 years.

I am sure that you would not approve of that light sentence for those people, would you?

Senator LEVIN. I think that people who oppose capital punishment feel exactly the way that you do about persons who committed that crime.

If you could be sure that there would never be a mistake in the criminal justice system, you might be persuaded that capital pun-

ishment would be an appropriate response, at least some of us would, but some of us feel that the possibility of a mistake is a real one.

We have outlined for this committee many, many instances where mistakes have been made and that is what I have done here today. Many of us who are concerned about the risk of error favor life without parole, a "real" life sentence and feel just as strongly about the horrors of that offense as you do, Mr. Chairman.

I would just read again, one paragraph from this St. Louis Post Dispatch article about Melvin Lee Reynolds who was sentened to life imprisonment for one of the most shocking murders in the history of St. Joseph's, MO.

The rest of that paragraph says, "That he took his first step to freedom today after another man confessed to committing the crime."

That is 4 years after he started to serve that sentence. There was a famous group of Michigan motorcyclists who were convicted of the most heinous crime that one could imagine, just about.

Without going into the details of it, and I did put the details of this in the Congressional Record, the details of that crime were as awful as one could imagine down in New Mexico.

They were on death row and a couple of enterprising newspaper reporters just kept digging and digging, and finally were able to put together a story which totally exonerated those motorcyclists.

So, Mr. Chairman, yes, the horrors are there; the revulsion is real; the sense of sympathy toward the victim's families and the victims, of violent crimes are just as intense on the part of opponents of the death penalty as they are on the part of the supporters. We are all human. We are all equally human, at least most of us.

Some of these folks who commit these crimes, I am not sure would rise to that dignity, but those of us who react the way the parents of that young woman reacted, react the same whether we happen to oppose capital punishment or whether we favor capital punishment.

Our difference has to do with whether or not we believe errors are made, and whether or not we believe that life in prison without parole is a better alternative, consistent with a society that wants to reduce the amount of violence, instead of reacting violently in the name of the State.

The CHAIRMAN. In my State, 7 years ago, a young couple, 14 and 15 years old, were sitting in a car, and some men came along dragged them out and shot the boy and took the girl out and raped her. Then they put some kind of an instrument up her sex organ, raped her several more times, and then shot and killed her.

They admitted the crime. Is capital punishment too good for that type of crime?

Senator LEVIN. In one sense, no.

In one sense—in the sense that I have indicated, it is a mistake in terms of policy for society to inflict the death penalty when we know we make mistakes.

You cannot assure me, Mr. Chairman, that we are not going to make mistakes. You cannot assure me. You are too conscientious

and you are too honest to give me that assurance that we are not going to make mistakes.

We know that we have made mistakes. We know that we have made mistakes where people have confessed to crimes, by the way. People have confessed to crimes that they did not commit. We have many examples of that in history where people have confessed, and by the way, in some instances, where people have freely confessed to crimes that they did not commit, where it was not even extracted out of them.

[The statement follows:]

TESTIMONY OF SENATOR CARL LEVIN

Mr. Chairman. Thank you for providing me with the opportunity to appear before the Committee today. I am pleased that the Committee decided to hold hearings on S. 239, the bill to reinstitute capital punishment for certain federal crimes. Although legislation identical to S. 239 passed in the Senate during the 98th Congress, hearings have not been held in the Senate Judiciary Committee on capital punishment since 1981. Much has happened in the interim and it is therefore a good idea to develop a hearing record today upon which the Senate can rely.

As the Chairman knows, I have taken an active role in the Senate in opposing capital punishment. There are many reasons why I have argued against the use of capital punishment, even though I share the horror and anger expressed by the proponents of this legislation toward those persons who commit violent crimes.

But a primary reason why we should reject the use of the death penalty is that we cannot eliminate the possibility that innocent people will be executed in a system which is administered by human beings. The risk of error is great and has been documented throughout our history. In 1981, I appeared before this Committee and related my personal experience with one such case. In the late 1960's, when I was the Deputy Chief Defender of the Legal Aid & Defender Association in Detroit, I was assigned to the case of Charles Clark, a man who had spent thirty years in prison for a murder he said he never committed. By the time I was assigned to his case, Charles Clark had refused commutation of his sentence by a number of Governors because that would not have proven his innocence.

Mr. Chairman, Charles Clark was convicted of the first-degree murder of a grocery store owner in Michigan in 1937. The jury was persuaded that Clark committed the murder by the only eyewitness who placed him at the scene of the crime -- the daughter of the store owner, Jenny Stefancyk. Her testimony during the trial was unshakable. During the trial she was asked: "Are you sure that Charles Clark was the man that stood behind you?" She answered, "I am". She was asked: "Are you positive that he had a gun in his hand?" She answered, "I am". It was Jenny Stefancyk's testimony alone that convicted Charles Clark.

Thirty years later, when I was assigned to the case, our investigation revealed that Jenny Stefancyk had at first told the police that she could not identify her father's murderer. After much effort, we were able to track down Jenny to ask her about the case. She told us then that her testimony in 1937 was a result of her being told by a detective that Charles Clark was the man who killed her father. We were able to get an affidavit from her which stated that the basis of her testimony was suggestion on the part of the detective and not her own identification. In 1967 Charles Clark finally walked out of prison a free man -- but only because Michigan did not have capital punishment.

Mr. Chairman, Charles Clark is only one man but his story has been repeated time and time again. Another miscarriage of justice occurred on July 7, 1865 when Mary Surratt was hanged for taking part in the assassination of President Lincoln even though the military commission that tried the Lincoln assassination case had recommended that her sentence be commuted. A June, 1985 American Bar Association Journal article on the execution of Mary Surratt states: "The case against Surratt was the most

questionable. The only witness who directly linked her to the conspiracy was Weichmann, who testified that he heard Booth tell her on the day of the assassination to drive out to a Maryland tavern she owned and instruct the keeper to 'have the shooting irons and whiskey ready that very night.' It was never revealed during the trial that Stanton he personally extracted this statement from Weichmann after suggesting he was guilty as the rest in the house and 'would have to pay the penalty.' After the trial Stanton found a position for Weichmann as a clerk in the Philadelphia customhouse." The article provides some more background on the case and then relates that at John Surratt's trial in 1867 -- two years after Mary Surratt's execution -- "...it was publicly revealed for the first time that five members of the military commission that tried his mother had recommended commutation of her death sentence. President Johnson immediately summoned the record, claiming he had never seen the recommendation. On the same day it was presented to him, he called for Stanton's resignation. He refused to resign, and his subsequent removal by Johnson ultimately led to Johnson's impeachment trial."

Mr. Chairman, those who support the death penalty argue that errors like the ones that occurred in the Charles Clark case and in the Mary Surratt case do not occur today because our criminal justice system has been greatly improved. Unfortunately, the truth is that such mistakes still happen and they happen frequently. When the Senate debated S. 1765, the predecessor of S. 239, Senator Metzenbaum and I provided documentation on many such cases which have occurred in the last ten years. I would like to insert in the record at this point some of the newspaper clippings I have gathered which demonstrate that the possibility of error in capital cases is great.

Mr. Chairman. I have focused on the possibility of error associated with capital punishment because I think that possibility of error alone is enough to justify our rejection of capital punishment. However, there are other equally compelling reasons why we should not reinstitute a federal death penalty.

First, there is simply no persuasive evidence that the death penalty deters people from committing serious crimes any more than does the threat of life imprisonment. In fact, a comparison of the murder rates in states with the death penalty and states without the death penalty reveals that states with the death penalty have average murder rates twice as high as the states without the death penalty. I would like to insert in the record at this point a comparison of murder rates compiled by the Library of Congress which suggests that the death penalty may actually increase the number of violent crimes.

Second, race continues to play a major part in the imposition of capital punishment. There are experts here today who are in a better position to discuss the discrimination issue, but I want to briefly mention that studies on the racial patterns in sentencing in capital cases show that the death penalty is still applied in a discriminatory manner. One study conducted by Samuel Gross and Robert Mauro of Stanford University found that the risk of a death sentence in Georgia, Florida and Illinois was far lower for those convicted of killing black people than for those convicted of killing a white person. "In Georgia, those who killed whites were almost 10 times as likely to be sentenced to death as those who killed blacks: in Florida the ratio was about 8 to 1 and in Illinois about 6 to 1."

Mr. Chairman, another good reason to reject the use of capital punishment is that it creates an enormous burden on our courts and criminal justice system. Because capital punishment is irreversible, the courts have been understandably reluctant to ignore new arguments made on appeal by attorneys for the accused. The result -- one which I happen to favor -- is that the men and women who are sentenced to death often spend years on death row pursuing their legal remedies before they are actually executed. I favor the delay because there have been so many cases where a person's innocence has been proven in the period of time between the date of conviction and the scheduled execution, but there is no question that the courts are burdened by lengthy appeals. Those persons who have been executed have spent an average of six years on death row. Of the approximately 2,900 men and women who have been sentenced to death since 1973, nearly one-half have had their sentences commuted by Governors, or vacated or reversed on constitutional or other grounds. We have wasted valuable resources administering the punishment of death when we could have been directing our energies toward more effective law enforcement measures.

In sum, the Committee should reject S. 239 because there is no convincing empirical evidence that it deters those who would commit capital crimes. In fact, capital punishment may exacerbate the crime problem we face by contributing to a cycle of violence. The death penalty is irreversible and our mistakes cannot be corrected. Additionally, the death penalty continues to be unfairly applied on the basis of the victim's race and against those who are poor and uneducated. Implementation of the death penalty requires the expenditure of enomorous resources without any commensurate benefit to society. On balance capital punishment is more harmful than beneficial to our citizenry and I hope the Committee will reject it in favor of more effective law enforcement measures.

The CHAIRMAN. The Senator from Alabama.
Senator DENTON. Thank you, Mr. Chairman.

## STATEMENT OF THE HONORABLE JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Senator Thurmond, I join you in strong support of S. 239, and I commend you for sponsoring this important piece of legislation. Since I have been in this body, you took the chairmanship of the Judiciary Committee and I think that you have brought a great improvement in our system of judicial activity.

I just wanted to acknowledge that to you, sir.

I have a prepared statement. I will deliver an abbreviated version, thereof, and ask unanimous consent that the remainder of my prepared statement be inserted into the record.

The CHAIRMAN. Without objection, it will be placed in the record.

Senator DENTON. I have great respect and affection for my colleague from Michigan, and I have found him to be a man of sincerity, great compassion and fairness.

In this case, I would want to discuss with him right now, in public as we would and have, often discussed in private, this particular issue.

I agree that there are many instances of innocent people being convicted and that some of these may have been put to death. I share your revulsion at that injustice and your aversion to the possibility of its being repeated by reinstituting the death penalty.

I do think, however, that our job here, is to promote the general welfare and that we do have cases in which the choice of legislation is based upon what welfare is more generally promoted by yes or no vote on a particular piece of legislation.

I tend to believe that there is more harm being done now, by virtue of the absence of a Federal death penalty than I believe would result by the passage of this bill.

I do not want to be overly simplistic, but saying that we should not have the death penalty because we may accidently execute an innocent man it is like saying that we should not have automobiles because some innocent people might be accidently killed in them. Or we should not have trucking or we should not have aircraft, or we should not have elevators because we are going to have accidents.

There are going to be some mistakes committed. The question is, On balance, which way do we better promote the general welfare?

I would give you one example that sticks in my mind, as you gave an example in your statement.

In October 1983, a prisoner in the Federal Correctional Institution in Marion, IL, mortally stabbed a guard 45 times. Later that same day, a second inmate managed to get free from his handcuffs, murdered one guard, and critically wounded two others.

While help was on the way, this inmate did a victory dance along the row of other prisoners. Both of these criminals knew fully well that the worst that could happen to them was the imposition of a life sentence in addition to the ones that they were already serving.

I think that example, which occurred in the same prison on the same day, and has many replications, in fact, over the history of

the period in which we have done away with the death sentence, is a compelling reason why we need to have the death penalty available in Federal courts. On balance, I believe that Federal courts must have the power to impose the death penalty or men like this will continue to kill, maim, and rape with impunity.

So, I would think that juries and judges, once the death penalty is reinstated, will not only be mindful of the degree of murder; first, second, and so on, but also—and this is a key nuance—I think that knowing that the death penalty might be imposed, they will also be very careful in their determination of guilt beyond a reasonable doubt.

To what degree have you proved beyond a reasonable doubt that this man committed murder? In other words, I think that there will be a greater propensity to downgrade from first degree to second degree murder, but when they go for a first degree, they will be that much more sure of their decision, there will be fewer of these miscarriages of justice, which you have outlined.

That is my opinion, and I hope that we can carry on further discussion about it.

I believe on balance that the general welfare would be better promoted by reinstating the death penalty in Federal courts.

And so, I do support the bill, and I appreciate the genuineness and sincerity and the authority from which you are coming, Senator Levin.

Thank you for being here today.

Thank you, Mr. Chairman.

Senator LEVIN. Thank you very much, Senator Denton for those kind words.

My feelings about you are similar, we have had a good relationship here and we differ on this issue and perhaps some others, but I have great respect for you.

Mr. Chairman, one quick comment.

We do not have much of an alternative to cars. We decide of practical necessity. We do have an alternative to capital punishment, it is called life in prison without parole. It is a greater deterrent than capital punishment. If you look at the States that have life sentences, they have a lower murder rate than States that have capital punishment, so it is a deterrent. Life imprisonment without parole expresses revulsion, it punishes. Society does have a right to express revulsion and to punish people who violate its laws. There are ways of doing it. There are alternatives, in other words, to capital punishment. There really is not a practical alternative to cars and planes, at least in modern society.

Senator DENTON. But the very example that I cited included men who were serving a sentence of life imprisonment but have continued to murder. We have a lot of that occurring during prison riots right now.

Senator LEVIN. That is, I think, a distinct problem, but S. 239 is not limited to that by any stretch of the imagination. It goes way beyond that.

Even in that situation, believe it or not, mistakes can be made.

The CHAIRMAN. We have a vote on.

Without objection, Senator Grassley has asked that his statement appear in the record.

And, Senator, let us see, would you want to go and vote and come back and then I can go, or shall I go now?

How would you rather do it?

Senator DENTON. I do have a 2:30 appointment, Mr. Chairman, but I can go and try to get someone else to quickly come back and chair.

The CHAIRMAN. All right, sir.

Thank you very much, Senator.

Our next witness is Stephen S. Trott, Assistant Attorney General, Criminal Division, Department of Justice.

Mr. Trott, we are glad to have you with us and you may proceed.

Could you take about 5 minutes and give us the thrust of your statement and put your entire statement in the record?

**STATEMENT OF STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Mr. TROTT. Thank you, Mr. Chairman, and members of the committee.

I am very pleased to be here today to express the strong support of the Department of Justice and of the administration for S. 239, the bill to reestablish constitutional procedures for imposition of the death penalty in certain especially heinous Federal crimes.

The administration ardently regards the passage of this bill as one of its highest priorities in the criminal justice area.

As you know, Mr. Chairman, S. 239, which you introduced for yourself and several other Senators, is identical to S. 1765 in the 98th Congress. That bill enjoyed bipartisan support when it was passed 63 to 32, on February 22, 1984.

S. 1765, in turn, was closely patterned after the administration's death penalty proposal submitted as a part of the comprehensive crime control bill, in the last Congress.

Since the House did not see fit to consider this or any other death penalty bill, it is imperative that the Senate again act, by passing this bill.

The reinstitution of the death penalty is long overdue as a possible punishment for certain especially serious Federal crimes. Until very recently, most persons thought primarily of first degree murder as such a crime, and indeed the punishment of death should be available for this offense. During the last year, however, we have seen appalling incidents of espionage cases in which it has been alleged and in some cases already proven, that military officers and others who enjoyed positions of special responsibility, and trust, have sold our country's secrets to foreign powers, thereby stabbing our nation in the back and placing the future of all U.S. citizens at risk, vis-a-vis our enemies.

These offenses underscore the necessity of having an enforceable Federal death penalty available for particular serious crimes of treason and espionage as well as for first degree murder.

Mr. Chairman, Senator Denton briefly referred to prison murders before he left. And if I may elaborate on that point?

In the U.S. Court of Appeals, in a case decided on July 8, 1985, the seventh circuit was dealing with the situation of prison murders. They consolidated a number of cases in that case, wherein

people who were already serving natural life sentences for the crime of murder and were continuing to murder other people while they were in prison, attacked and murdered prison guards. This case, in particular, sets forth the details of these murders in a very disturbing degree.

The part of the opinion that I think is quite unusual and very instructive, appears at page 22 of the version I have that says, "The facts cry out for a Federal death penalty for prison murders."

And the reason for that is that prison guards and prison personnel, and yes, other prisoners, frequently are murdered, already by people serving life, even life without possibility of parole. And as a just punishment for that type of offense and as a deterrent to protect other prisoners and prison officials, the death penalty under Federal law must be absolutely available, is absolutely necessary.

The previous witness referred to the problem of mistakes. And he suggested that because of some historical mistakes, we, therefore, ought not to have the death penalty available under Federal law.

In the first place, the death penalty is already available, I believe, in at least 38 States. And second, the bill with which we are dealing is certainly not a mandatory death penalty bill. It sets forth very carefully a system of rules, regulations and procedures that, in my judgment, and I have been a prosecutor for 20 years, will ensure that the decisionmaking process is free of the kinds of errors referred to by the previous witness.

Second, it was notable to me, that the system itself succeeded in righting most of the wrongs that were referred to. This should be available as an option for the most serious cases.

Mr. Chairman, I put it to you that the mistake, if we are talking about mistakes, is not having this on the books, because it has been my personal experience and the experience of police officers with whom I have worked for 20 years, that the existence of the death penalty on the books acts as an effective deterrent to protect innocent life and the national security.

I cannot tell you the number of cases where police officers, with whom I have worked, told me of apprehending robbers, and other thieves using toy or empty guns, who, when asked why are you using a toy or an empty gun, said, hey, listen, I am willing to ride the beef for a 211 or a robbery but I am not about to go and shoot somebody and have a death penalty staring me down the throat.

I was involved in a kidnapping case, where a woman was kidnapped. The first thing that the kidnappers did was sit her down and tell her, lady, you do not have a thing to worry about. We are not about to put a scratch on you because we know that there is a death penalty possibility for that. So as soon as we get the money, you are going to be released, just do not panic and you will not get hurt.

Nobody will ever tell me that the death penalty is not an effective deterrent. And whom does it deter? It deters serious and dangerous criminals who would jeopardize innocent life and the national security of the United States.

So the mistake is not having it on the books, because from my perspective, we ought sure to be focusing on people in the system who are convicted, but also on the innocent people of America and

on the national security which the Court system is designed to protect.

The CHAIRMAN. I am going to have to go and vote now. The 5-minute bell has rung and there are about 3 minutes left.

Are you about through your statement?

Mr. TROTT. Yes, Mr. Chairman.

Let me just summarize by saying——

The CHAIRMAN. I will be back in a few minutes and we will just take a recess for a few minutes.

[Whereupon a brief recess was taken.]

The CHAIRMAN. Mr. Trott, you may continue.

Mr. TROTT. Thank you, Mr. Chairman.

Mr. Chairman, we know that there are some persons who believe that society is not justified in taking a criminal's life, no matter how despicable his actions, or how much of a danger he poses to the community. Let me state once again, that this administration does not and cannot share that point of view.

Common sense alone tells us that the death penalty operates as an effective deterrent for crimes involving planning and calculation. Espionage is a good example; Presidential assassination is a good example; attempted assassination of the President is a good example; and many of the murders that go on in prison, especially of prison officials, is yet another good example.

Society, in our view, has a right—which the Supreme Court has repeatedly reaffirmed—to exact a just punishment on those individuals who deliberately flout its laws in a particularly harmful and heinous and dangerous way.

For some offenses death is the only just punishment. We firmly believe that civilized society has a right, if not a duty, to rid itself permanently of those individuals who have been found to have committed certain carefully described, but especially harmful offenses in an especially aggravated manner.

Mr. Chairman, unfortunately as we have found out in the last few years, our country, because of the liberty that we extend to everybody, is full of people from hostile countries, attempting to steal the national defense secrets of our Nation.

Our defense secrets, as far as we are concerned, protect the future of the human race, and if we do not provide the most effective deterrent to that type of behavior possible, I think that we are falling short of our obligation to protect national security.

Our administration wants every person, who is contemplating selling national defense secrets to the Soviet Union under the circumstances that are described by this bill, to have to think twice about what they are doing in terms of what the payment is going to be if they do that and if they are apprehended.

We want everybody who is in prison, considering attacking a prison official or another inmate under the circumstances described by this bill, to have to think twice about what the penalty might be for that type of behavior.

And we want people who are possibly thinking about assassinating our Presidential leaders, our Presidential aspirants, to have to think twice about what they are doing in terms of what the ultimate penalty should be.

It is our view that a fear of execution does function as a successful deterrent to protect innocent people. And it is precisely because of our reverence for innocent life and the national security, that we have come to the objective conclusion that to protect those values, on occasion, one must have to extract the ultimate penalty, itself, which is death.

The CHAIRMAN. Thank you very much, Mr. Trott.

Are you about through?

Mr. TROTT. Yes, Mr. Chairman.

In conclusion, let me then urge speedy consideration and passage of S. 239, by both the committee and the Senate. The American people want and deserve nothing less and I would be pleased to answer any of your questions.

The CHAIRMAN. Thank you very much.

[The statement follows:]

## Prepared Statement of Stephen S. Trott

Mr. Chairman and Members of the Committee, I am pleased to be here today to express the strong support of the Department of Justice and of the Administration for S. 239, the bill to reestablish constitutional procedures for the imposition of the death penalty in certain especially heinous federal crimes. The Administration regards the passage of this bill as one of its highest priorities in the criminal justice area.

As you know, Mr. Chairman, S. 239, which you introduced for yourself and several other Senators, is identical to S. 1765 in the 98th Congress. That bill enjoyed strong bipartisan support when it was passed 63-32 on February 22, 1984. S. 1765, in turn, was closely patterned after the Administration's death penalty proposal submitted as a part of the Comprehensive Crime Control Bill in the last Congress. Since the House did not see fit to consider this or any other death penalty bill, it is imperative that the Senate again act by passing this bill.

The reinstitution of the death penalty is long overdue as a possible punishment for certain especially serious federal crimes. Until very recently, most persons thought primarily of first degree murder as such a crime, and indeed the punishment of death should be available for this offense. During the last year, however, we have seen appalling incidents of espionage cases in which it has been alleged -- and in some cases already proven -- that military officers and others who enjoyed positions of special responsibility and trust have sold our country's secrets to foreign powers. These offenses should underscore the necessity of having an enforceable death penalty available for particularly serious cases of treason and espionage as well as for first degree murder.

Mr. Chairman, over four years ago -- on April 10, 1981 to be exact -- my predecessor as head of the Criminal Division and now Deputy Attorney General D. Lowell Jensen appeared before this Committee to express firmly the then new Administration's support

for death penalty legislation. Mr. Jensen recognized then, and we still acknowledge today, that the death penalty is controversial in some quarters. We know that there are some persons who believe that society is not justified in taking a criminal's life, no matter how despicable his actions or how much of a danger he poses to the community.

Let me state once again that this Administration does not and cannot accept that point of view. First, common sense tells us that the death penalty operates as an effective deterrent for crimes involving planning and calculation. Espionage is a good example. Presidential assassination is another, and so is an attempted assassination of the President that comes close to succeeding. S. 239 would specifically make this latter offense subject to the death penalty, a feature which the Administration approves.

Second, society has a right, as the Supreme Court has repeatedly reaffirmed, to exact a just punishment on those individuals who deliberately flout its laws in a particularly harmful and dangerous way. For some offenses, death is the only just punishment. We firmly believe that civilized society has a right if not a duty to rid itself permanently of those individuals who have been found to have committed certain carefully described but especially harmful offenses in an especially aggravated manner.

Since Mr. Jensen testified in 1981, the Committee has devoted considerable time to legislation reinstituting capital punishment and has carefully examined this issue from both a policy and a constitutional standpoint. Actually, this is merely a continuation of the Committee's consideration of capital punishment bills which it commenced shortly after the decision in Furman v. Georgia, 408 U.S. 238 (1972). That decision, in effect, made many of the death penalty provisions in state and federal law inoperative by holding that the unlimited discretion as to whether or not to impose this punishment given judges and

juries under many statutes then in effect caused the death penalty to be imposed so arbitrarily and capriciously as to constitute cruel and unusual punishment under the Eighth Amendment.

However, following Furman, the Supreme Court considered a number of state death penalty statutes and provided guidance as to what procedures are constitutionally mandated for the imposition of this punishment. 1/ In these cases the Court has clearly held that the death penalty is a constitutionally permitted sanction if imposed under certain procedures and criteria which guard against the unfettered discretion condemned in Furman. In essence, S. 239 is drafted so as to reflect these requirements as set out by the Supreme Court. It provides for a special post-conviction sentencing hearing at which aggravating and mitigating factors involved in the crime are to be considered and weighed in determining whether to impose the penalty of death.

Hence, as the Committee has discussed in its report on S. 1765, S. 239 meets all constitutional requirements. I am not going to take up the Committee's time by again going over this point, but I can say emphatically that the Department agrees both with the constitutional analysis set out in that report and with its compelling argument for the death penalty as a matter of policy. 2/

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1/ Particularly notable in this series of cases was a group of landmark decisions all handed down on the same day in 1976 -- Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280; and Roberts v. Louisiana, 428 U.S. 325. At the present time, 38 states have revised their laws after the Furman case to comport with these and other post-Furman decisions.

2/ Especially since 1981, the Department of Justice has worked closely with the Committee in preparing legislation dealing with capital punishment. S. 1765, and now S. 239 reflect in large part the input of the Department. We note, however, that these bills require the trier of fact at the special sentencing hearing for which they provide to consider whether all the aggravating factors found to exist outweigh all the mitigating factors so as to justify the sentence of death, or in the absence of any mitigating factor, whether any aggravating factors alone are

(Footnote Continued)

In conclusion, Mr. Chairman, let me again urge speedy consideration and passage of S. 239 by both the Committee and the Senate. The American people want and deserve nothing less. I would be pleased to answer any questions at this time.

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(Footnote Continued)

sufficient to justify this punishment. These bills would allow the jury, if it rather than the court is sitting as the trier of fact at the sentencing hearing, to find the existence of a particular aggravating or mitigating factor (if more than one is found) by a simple majority vote, provided the jury found unanimously that some aggravating factor was present. The Department of Justice has consistently urged that as a matter of policy it is preferable that unanimity be required as to the presence of each aggravating factor and the absence of each mitigating factor. We have also worked with the Committee's staff to provide minor amendments to clarify some aspects of the bill as a result of a colloquy between the Chairman and Senator Levin during last year's floor consideration of S. 1765.

The CHAIRMAN. Now, we have a panel, and we would ask them to come forward.

Ms. Diann Rust-Tierney, counsel for the American Civil Liberties Union; David Bruck, National Association of Criminal Defense Lawyers; Paul Kamenar, assistant legal director of Washington Legal Foundation; and James David Barber, board of directors of Amnesty International.

Mr. Barber, I understand that you have to catch a plane, so we will take you first.

Now, we are going to limit each one to 5 minutes. You can put your whole statement in the record, but we have another hearing and we have got to get to it.

So, you will take 5 minutes, Mr. Barber, and you will go first.

**STATEMENT OF A PANEL CONSISTING OF DIANN RUST-TIERNEY, ESQ., COUNSEL, AMERICAN CIVIL LIBERTIES UNION; DAVID BRUCK, ESQ., NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; PAUL KAMENAR, ASSISTANT LEGAL DIRECTOR, WASHINGTON LEGAL FOUNDATION; AND JAMES DAVID BARBER, CHAIR, BOARD OF DIRECTORS, AMNESTY INTERNATIONAL, U.S.A.**

Mr. BARBER. Thank you very much.

My name is James David Barber and I am the chairman of Amnesty International in the United States. And I have here with me, Mr. Chairman, Charles Fullwood, who is national director of our effort for abolition of the death penalty.

We are glad to have this opportunity to state Amnesty International's views, regarding the proposed reintroduction of capital punishment under Federal jurisdiction in the United States.

Amnesty International is an independent, nonpartisan worldwide organization with more than 200,000 members in the United States.

We seek the release of men and women anywhere, in prison for their beliefs, color, sex, ethnic origin, language, or religion, provided that they have not used or advocated violence.

Amnesty International also advocates fair and early trials for all political prisoners and works on behalf of such prisoners detained without charge or trial.

We oppose, without reservation, torture, or other cruel or inhuman punishments of any prisoner. Sentence of death is the ultimate form of cruel and inhuman punishment.

It is this last, ultimate human rights concern which brings me here today.

In 1776, Thomas Jefferson described certain rights as inalienable; namely, life, liberty, and the pursuit of happiness. Mr. Jefferson's definition of "human rights" expressed the unique mission of the United States, the first Nation founded on these high principles.

These principles have set the basis for world standards for human rights. I am referring to the Universal Declaration of Human Rights upon which Amnesty International bases much of its work.

Article 5 of the Universal Declaration of Human Rights states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

This high principle is derived from the International Covenant on Civil and Political Rights, which states, "The sentence of death shall not be imposed for crimes committed by anyone below the age of 18 years of age, and shall not be carried out on pregnant women."

It goes on to state, however, "That nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any state, party to the present covenant."

The death penalty goes right to the heart of the values and principles embodied in these documents and to the spirit of our own Constitution and the Declaration of Independence.

For at the heart of it, the death penalty is really a human rights question.

Clearly the killing of a locked-up, disarmed, powerless human being constitutes a cowardly abuse of human rights. No honorable military officer, for example, kills his captured prisoner. But does the death penalty nevertheless, help protect us against murder, terrorism, or assassination?

Almost 25 years experience documenting human rights abuses, Amnesty International has seen that the death penalty does nothing to make society safer. In fact, the individual's security is threatened when government tries to stop criminal violence by using State instituted violence.

We will gladly provide the committee with detailed, comprehensive evidence on these points.

Taking a world view of the death penalty, what constitutes a capital offense in one country is not what constitutes a capital offense in another. The death penalty is considered justifiable punishment for murder in the United States. In Iran, the crimes of homosexuality, infidelity, prostitution, smuggling, and drug trafficking are capital offenses. In the Soviet Union, the death penalty is mandated for economic crimes. There is, quite clearly, no international agreement about the application of the death penalty, nor can there be in the wide cultural and political gulfs that exist among nations.

The argument has been made that capital punishment is justifiable and ethically correct in the American context, because of the history of our respect for due process of law and the defendant's right to appeal.

A close examination of some statistics of those on death row in America would uncover some deeply troubling facts.

In 1972, the U.S. Supreme Court nullified all existing death sentences on the grounds that most State death penalty laws violated the U.S. Constitution, because of the arbitrary and capricious manner in which they were applied. Examination of the patterns of sentencing will show that this is still the case.

There are about 20,000 homicides a year in the United States, and only about 4,000 persons, one out of five, are convicted of murder. Only 250 of those convicted are sentenced to death. Blacks constitute only 12 percent of the U.S. population but more than 41 percent of death row inmates are black.

These facts explode the myth that there is any semblance of due process of law in the actual application of the death penalty in the United States.

The Federal death penalty bill, which was introduced in the U.S. Senate in January, would allow a death sentence not only for homicide, but also for espionage, treason, attempts to kill the U.S. President and felony murder.

This bill would, therefore, substantially broaden the range of crimes which would be punishable by death penalty.

The bill before you thus runs counter to the trend toward narrowing and eventually stopping execution in nation after nation.

On December 6, 1977, a resolution in the United Nations General Assembly reaffirmed that the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offenses for which the death penalty may be imposed, with a view to the desirability of abolishing this punishment.

Amnesty International believes that as a deterrent this bill is even more questionable, considering the kinds of crimes that it is specifically meant to punish.

Is it likely that an airplane hijacker, who already knows he may be gunned down by a rescue squad, will be further deterred by the prospect of taking his chances on getting death instead of a life sentence in our courts?

Is it consistent with what we know of terrorists, such as those who blew up 241 marines and themselves, in Beruit, that they will pause because they fear that they might be martyred in an American electric chair?

The CHAIRMAN. Mr. Barber, your time is about up; are you almost finished?

Mr. BARBER. Yes, certainly, thank you, sir.

Does it make sense that the kinds of people who have tried to kill our Presidents would stop because they might be executed?

These innovations in the bill are accompanied by a collection of other broadening features which do not appear to reflect a solid, factual understanding of the way homicide works in this country.

Amnesty International has called for the establishment of a national commission which would carefully examine all aspects of capital punishment and its relationship to international and constitutional standards.

Perhaps the most disturbing implication of this bill, however, is the signal it sends to other nations, who look to the United States for an example.

This bill means that the United States of America, the largest democracy in the world, stands out as an exemplar of this odious punishment.

Amnesty International has pointed out, the death penalty is dying out in the civilized world.

For example, Western Australia, the last Australian state retaining the death penalty for ordinary offenses, banned it last year.

The CHAIRMAN. Your time is up, Mr. Barber.

We will put your whole statement in the record.

Mr. BARBER. Thank you, Mr. Chairman.

[The statement follows:]

## Prepared Statement of James David Barber

My name is James David Barber and I am the Chairman of Amnesty International U.S.A.

We welcome this opportunity to state Amnesty International's views regarding the proposed re-introduction of capital punishment under federal jurisdiction in the United States.

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The death penalty goes right to the heart of the values and principles embodied in these documents and to the spirit of our own Constitution and Declaration of Independence. For at the heart of it, the death penalty is really a human rights question.

Clearly the killing of a locked-up, disarmed, powerless human being constitutes a cowardly abuse of human rights. No honorable military officer, for example, kills his captured prisoner. But does the death penalty nevertheless help protect us against murder, terrorism or assassination?

In almost 25 years experience documenting human rights abuses, Amnesty International has seen that the death penalty does nothing to make society safer. In fact, the individual's security is threatened when government tries to stop criminal violence with state-instituted violence. We will gladly provide the Committee with detailed, comprehensive evidence on these points.

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But a close examination of the statistics of those on death row in America would uncover some deeply troubling facts.

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There are about 20,000 homicides a year in the United States. Only about 4,000 persons -- one out of five -- are convicted of murder. And only 250 of those convicted are sentenced to death. Blacks constitute only twelve per cent of the United States population, but more than 41% of death row inmates are black. These facts explode the myth that there is any semblance of "due process of law" in the actual application of the death penalty in the United States.

The federal death penalty bill which was introduced in the U.S. Senate in January would allow a death sentence not only for homicide but also for espionage, treason, attempts to kill the U.S. President, and felony murder. This bill would therefore substantially broaden the range of crimes which would be punishable by the death penalty.

The bill before you thus runs counter to the trend toward narrowing and eventually stopping execution in nation after nation. On December 6, 1977 in resolution 32/62 the United Nations General Assembly reaffirmed that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment.

Amnesty International believes that as a deterrent this bill is even more questionable, considering the kinds of crime it is specifically meant to punish.

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Does it make sense that the kinds of people who have tried to kill our Presidents would stop because they might be executed?

But these innovations in the bill are accompanied by a collection of other broadening features which do not appear to reflect a solid, factual understanding of the way homicide works in this country.

Amnesty International has called for the establishment of a national commission which would carefully examine all aspects of capital punishment and its relationship to international and constitutional standards.

Perhaps the most disturbing implication of this bill, however, is the signal it sends to other nations who look to the United States for an example.

This bill means that the United States of America, the largest democracy in the world, is expanding further the use of this odious punishment.

Amnesty International has pointed out that the death penalty is dying out in the civilized world. For example, Western Australia -- the last Australian State retaining the death penalty for ordinary offences -- banned it last year. In each year since 1975, at least one country abolished the death penalty. By the end of 1984, 27 governments had abolished the death penalty for all offences. Of the nations which keep it in their legislation, many have not executed anyone for years.

In 1976 Canada outlawed capital punishment. France did the same thing in 1981. In 1983 the British Parliament voted against reviving the death penalty despite increases in terrorist attacks. The British felt that the death penalty would provide no solution and might possibly even aggravate the situation.

We at Amnesty International believe that society is not protected by a government putting its own citizens to death. We believe that society's ultimate protection is based on a respect for all human rights.

If I may close with the words of Dr. Andrei Sakharov, a man who at this very moment is suffering because of his defense of human rights in his own society:

> " I regard the death penalty as a savage and immoral institution that undermines the moral and legal foundations of a society. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true -- that savagery begets only savagery. '

The CHAIRMAN. Our next witness is Mr. David Bruck, National Association of Criminal Defense Lawyers.

You have 5 minutes, Mr. Bruck.

## STATEMENT OF DAVID BRUCK

Mr. BRUCK. Thank you very much, Mr. Chairman.

I am David Bruck from Columbia, SC, and I appreciate the chance to speak to you on behalf of the National Association of Criminal Defense Lawyers.

Mr. Chairman, the main thing that I would like to discuss with you today, has to do with the legalities of this bill.

This measure has been considered as I understand it, in this committee for 4 years. Therefore, I was frankly amazed upon reading this bill, to discover that it contains an extraordinary array of constitutional defects. Indeed, these defects actually make this debate a little bit less dramatic than it would otherwise be, because even if this bill was passed, I doubt very seriously that anyone could constitutionally be put to death under it.

The first problem is that the drafters of this bill have apparently failed to read the U.S. Supreme Court decision in *Enmund* v. *Florida*, which held that death may not be imposed on anyone who did not intend to take life. The bill would allow the imposition of the death penalty for felony murder where the person knew only, or should have known only that he was creating a grave danger of death or serious bodily injury. That is not just sufficient under the *Enmund* case.

In fact, that was exactly what the State of Florida argued ought to be sufficient, and the U.S. Supreme Court, through Justice White, said, No, it is not. It creates a grave risk of death to commit an armed robbery with a gun. But a nontrigger man may not be put to death, according to the *Enmund* decision.

This bill unaccountably ignores that holding.

Second, and even more surprising, the bill repeatedly violates the principle of *Lockett* v. *Ohio*. *Lockett* is the case that says that the sentencer must be allowed to consider all mitigating circumstances. The bill, for some reason, does not require only permits consideration of all but four statutory mitigating circumstances. This bill does not even require the jury to consider the fact that the offender has no prior record. It is amazing after 10 years of Supreme Court decisions the drafters of this bill have failed to take these basic, elementary constitutional rights, spelled out by the Supreme Court, into consideration.

Third, the bill is overly broad. For example, it would permit a death sentence to be imposed on one who created, by an act of espionage, a grave risk of substantial danger to the national security.

Think about that for a moment. Not someone who harmed national security. Not even someone who created a danger of harming national security. But someone who created a risk of danger of harming national security.

Now, what on Earth is a jury to make of that language? It is virtually meaningless and I am sure that the U.S. Supreme Court would so hold.

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Fourth, there is no mandatory appellate review provided by this bill. That would make this statute unique among the death penalty statutes of the United States, so far as I am aware. There is no State death penalty statute that does not require automatic review, regardless of whether or not the defendant's lawyer files his notice of appeal on time.

Then there are some other peculiar provisions of this bill that have nothing to do with the death penalty. The bill would appear to make the availability of life imprisonment without parole dependent not on the fact that a defendant did or did not commit an aggravated crime, but rather on the mere fact that the prosecutor chose to ask for the imposition of the death penalty—without regard to the actual facts of the crime.

Then when the prosecutor failed to get the death penalty—knowing all along that it was not warranted by the evidence—he would by virtue of having sought death, the judge would be able to ask the judge to impose a much more severe sanction.

These and other defects in the bill are, to me and to the National Association of Criminal Defense Lawyer, simply amazing. Regardless of how one feels about the death penalty, I would submit that this bill ought to go back to the drawing board. This is simply not a bill that will pass scrutiny by the U.S. Supreme Court. It does not even come close.

Finally, I realize that the death penalty is something that people have very strong views about in theory. But by now we have enough experience with capital punishment in this country to know that—whatever you think about the death penalty in theory—actually trying to design a system that sorts out which people should die from the far larger number of people that will be permitted to live only serves to get us all into the most tangled-up, discriminatory, demoralizing mess that you ever did see.

The Federal Government is very lucky to have avoided this problem up until now. I hope that we will continue to avoid it. Accordingly, the National Association of Criminal Defense Lawyers hopes that this bill will not become law.

Thank you.

The CHAIRMAN. Thank you, Mr. Bruck.

Ms. Diann Rust-Tierney, we will be glad to hear from you.

## STATEMENT OF DIANN RUST-TIERNEY

Ms. RUST-TIERNEY. Good afternoon, Chairman Thurmond.

I am legislative counsel with the American Civil Liberties Union. I would just like to say from the outset, that I would like to respond to a comment that Mr. Trott made earlier.

He suggested that there are countless cases which support the proposition that the death penalty is an effective deterrent.

In fact, what we were hearing was ancedotal evidence. If anything, I believe that the evidence suggests that the question of whether or not the death penalty is an effective deterrent is, an open question. In fact, as Senator Levin pointed out earlier, there is some evidence that States with the death penalty actually have higher murder rates.

The ACLU vigorously opposes S. 239, because we believe that the death penalty is under all circumstances cruel and unusual punishment, prohibited by the eighth amendment.

Although a majority of the Supreme Court has declined to hold that the death penalty is unconstitutional per se, the Court has declared that the penalty is only permissible in very limited circumstances, and then only in conformance with tightly drawn procedures.

My copanelist, Mr. Bruck, has pointed out some of the procedural aspects of the provision which raise serious constitutional questions. I will not belabor those points.

I would only point out that my written testimony deals in some detail with those very serious constitutional problems.

I would like to focus your attention on what I think is at the heart of the legislation.

The CHAIRMAN. Excuse me, just a minute.

Ms. RUST-TIERNEY. Surely.

The CHAIRMAN. Senator McConnell.

Senator MCCONNELL. Thank you, Mr. Chairman. I just want to indicate my support for the bill and to ask that a statement of mine in that regard be included in the record, and then I need to excuse myself, because I have to go to a juvenile justice hearing going on simultaneously.

Thank you.

Senator SPECTER. Mr. Chairman, I, too, am on my way to a juvenile justice hearing and I want to express my regrets for not being able to stay longer. It is a very busy day. I just left an appropriations markup.

But I would like to submit a statement for the record, also, Mr. Chairman.

The CHAIRMAN. Do you favor the bill?

Senator SPECTER. I think so, I just do not know all about the bill. If it is—I know that it is on the death penalty and I have——

The CHAIRMAN. The same bill passed the committee and the Senate last year.

Senator SPECTER. I have consistently supported the death penalty, Mr. Chairman, since I was district attorney in Philadelphia and led the fight to bring back the death penalty successfully after *Thurmond* v. *Georgia* declared it unconstitutional in 1972, and I also have a lot of experience about the deterrent effect of the death penalty.

So if that comprehends the substance of the bill, I am in favor of it. I would like to read it first, before a final commitment, however.

The CHAIRMAN. Thank you.

Excuse me, you may proceed.

Ms. RUST-TIERNEY. I would like to focus your attention a little bit on what we were talking about earlier in terms of the difference between the death penalty in theory and the death penalty in practice.

Recently——

The CHAIRMAN. I am sorry, what is that noise down there?

It sounds like a hammer hitting something.

Ms. RUST-TIERNEY. Can you still hear me?

The CHAIRMAN. Go ahead.

Ms. RUST-TIERNEY. Recent developments, suggest that we ought to take a closer look at what is at the heart of this legislation. In a case by the name of *Glass* v. *Louisiana*, Justice Brennan, in his dissent reminds us of something that the Supreme Court has always held,

> The Constitution limits not only the procedures, by which the death penalty may be imposed, but it actually limits the punishment, itself. The measurement of what punishment is appropriate and consistent with the Constitution, is dependent upon the evolving standard of decency of a mature society. And that standard makes such punishments, which amount to torture, burning at the stake and beheading, clearly unconstitutional.

In his dissent in *Glass*, Justice Brennan examines the facts surrounding death by electrocution, and concludes that death by electrocution is neither instantaneous nor painless, as the Supreme Court postulated some 95 years ago in a case by the name of In Re Kemmler.

In fact, he concludes, that the death penalty by electrocution, may in fact, rival burning at the stake for its horror and its violence.

I would urge you and other members of this committee to read that opinion and also to read the excerpts of that opinion that I have placed in my written comments, because it suggests that this committee ought to be looking very seriously at what it is, in fact, authorizing and enacting into legislation.

His opinion raises some serious constitutional questions for this body.

S. 239 provides that the death penalty will be imposed in the manner in which the State in which the individual is sentenced imposes death. There are 37 States and 2 Federal jurisdictions which now provide for the death penalty: 16 provide for the death penalty by lethal injection; 14 by electrocution; 4 by hanging; 2 by firing squad; and 7 by gas chamber. Six States proscribe more than one method.

This committee must look at each of these methods of execution to determine whether or not they are consistent with the requirements of the Constitution.

In closing, I would add that the fact that Justice Brennan focused on the death by electrocution, does not, serve as an endorsement of the other methods of execution. I think that there is ample evidence to suggest that lethal injection, for example, results in a long lingering death which raises serious questions about its constitutionality.

The problems which I have discussed briefly in my testimony today and also in my written statement raise serious questions about whether this bill ought to become law.

I would urge you and this committee to reject this piece of hasty legislation, which, in fact, takes us down a very dangerous road of unconstitutionality.

Thank you.

[The statement follows:]

## Prepared Statement of Diann Rust-Tierney

### I. BACKGROUND OF THE FEDERAL DEATH PENALTY

In 1972, every death penalty statute in the United States was overturned when the United States Supreme Court ruled that wholly discretionary determinations to impose the death sentence created a substantial risk that the punishment would be inflicted in an arbitrary and capricious manner in violation of the Eighth Amendment prohibition against cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238 (1972). As Congress itself has recognized, the effect of Furman was to eliminate the death penalty as a possible sanction for any federal crime because the procedures under which it could be imposed did not comport with the Eighth Amendment. See House Report No. 93-885, Anti-Hijacking Act of 1974, 1974 U.S. Code Cong. & Admin. News 3975, 3981.

In 1974, Congress attempted to respond to the concerns of Furman by enacting a statutory death penalty scheme to be used against those convicted of aircraft piracy in which death occurred. In providing for the death penalty for this crime, Congress improperly construed Furman as holding what the death penalty could only be imposed under a mandatory sentencing scheme, and therefore it enacted such a mandatory scheme in the Anti-Hijacking Act of 1974. 49 U.S.C. Sec. 1437. Two years after the passage of this Act, the United States Supreme Court unequivocally announced that mandatory death sentencing schemes violates the Eighth Amendment. Woodson. v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana 428 U.S. 325 (1976). See also. Roberts v. Louisiana, (Roberts II), 431 U.S. 633 (1977). Since the ill-fated Anti-Hijacking Act, Congress has not legislated in the area of the death penalty. Thus it is clear that, under current federal law, the death penalty cannot constitutionally be

imposed for any federal crime. Gillers, "Deciding Who Dies," 129 U. of Pa. L. Rev. 1, 13 n.48 (1980).

There have been repeated attempts in the 94th, 95th, 96th, 97th, 98th and now the 99th Congresses to enact a federal death penalty. These efforts centered on the Senate Judiciary Committee and the debate on the federal criminal code revisions. In the 94th Congress, sponsors of the death penalty bill offered it as an amendment to federal criminal code bill S. 1437, when the code was being considered by the Senate. The amendment was rejected. During this period there were no hearings on the need for a federal death penalty though there were limited hearings on the procedural aspects of the imposition of the death penalty.

The 96th Congress took steps towards the reenactment of a federal death penalty statute designed to make the death penalty available for three classes of crimes: (1) murder, (2) treason and aggravated espionage; and (3) kidnapping, airplane hijacking, wrecking trains, taking hostages, mailing injurious articles, and explosives offenses where death results. This bill, S. 114 was reported favorably by the Senate Judiciary Committee by a vote of 7 to 4 on December 4, 1979 without hearings or debate. The sponsors of S. 114 stressed their belief that it satisfied the constitutional requirements for the imposition of death. Indeed the bill was hopefully entitled, "A Bill To Establish Constitutional Procedures For The Imposition Of The Sentence Of Death."

The American Civil Liberties Union immediately pointed out that this bill was unconstitutional for a number of reasons. When it became clear that S. 114 would not pass, Senator Helms introduced S. 2377 on June 18, 1980 as an amendment to the Department of Justice FY 1981 Appropriations Bill. This bill was identical to S. 114 except that it attempted to correct one of the obvious constitutional defects of the earlier bill that, in violation of Lockett v. Ohio 438 U.S. 586 (1978), precluded the

sentencing body from considering relevant mitigating factors in deciding whether to impose a sentence of death.

On January 15, 1981, Senators Thurmond and DeConcini introduced an updated version of S. 114 in the 97th Congress. Senator DeConcini conceded that the previous Congress' "Bill To Establish Constitutional Procedures" was unconstitutional because it failed to address the concerns of the Supreme Court's 1978 decision in Lockett v. Ohio. See statement of Senator DeConcini, Cong. Rec. (January 15, 1981) at S. 161. This version of S. 114 modestly removed the claim of constitutionality from its title: "A Bill To Establish Rational Criteria For the Imposition Of The Sentence Of Death." In fact, after a report of th Reagan Justice Department confirmed the existence of numerous constitutional problems that had been identified by the ACLU, S. 114 was amended in a number of respects once again. While that later version of S. 114 corrected some constitutional problems, it introduced others. It was, nevertheless, passed out of the Judiciary Committee. No action was taken by the full Senate.

On February 22, 1983 Senators Thurmond and DeConcini again introduced a version of S. 114 in the 98th Congress. While the bill for the first time authorized the imposition of a life sentence without parole and permitted jury consideration of non-statutory aggravating circumstances, it appeared in all important respects, to be substantively the same as earlier versions. On August 4, 1983, that bill, S. 1765, was reported out of the Judiciary Committee without any hearings. The bill was passed by the Senate on February 4, 1984. The measure failed to be acted upon by the House.

On January 22, 1985 Senators Thurmond and Deconcini introduced S.239 which is virtually identical to S. 1765. Overall, the ACLU's position is unchanged: the experience since the enactments of the post- Furman death penalty schemes indicates the inability of statutory procedures such as those provided for in S.239 to overcome the arbitrary pattern of sentencing

condemned in Furman. Moreover, S. 239 violates clear constitutional requirements for death penalty and criminal statutes.

II. THE UNCONSTITUTIONALITY OF THE DEATH PENALTY

A. Unconstitutional Per Se

The American Civil Liberties Union has unwaiveringly maintained that the infliction of capital punishment is unconstitutional per se. The ACLU reiterates its strong support for the position consistently espoused by Justices Brennan and Marshall of the United States Supreme Court that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth Amendment.

> As the Court held in Trop v. Dulles, 356 U.S. 86 (1958), the basic concept undelying [the Cruel and Unusual Punishment Clause] is nothing less than the dignity of man. while the State has the power to punish, the [Clause] stands to assure that this power be exercised within he limits of civilized standards.

Id. at 100.

In determining what these constitutional limits are, the Eighth Amendment must be evaluated in light "of the evolving standards of decency that mark the progress of a maturing society." Id. at 101. As Justice Brennan stated in his dissent in Gregg v. Georgia, 428 U.S. 153, 230 (1976):

> Death for whatever crime and under all circumstances is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. ... An executed person has indeed 'lost the right to have rights" ... Death is not only an unusually severe punishment, unusual in its pain, it its finality, and in its enormity but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment.

B. The Unrectified Problems of Arbitrary and Capricious Sentencing Under the "Revised" Death Penalty Statutes.

Although a majority of the Justices of the Supreme Court has not yet adopted the position that all executions are barred by the Eighth Amendment, the Court has declared that the unique and

awesome character of capital punishment requires an elevated standard of scrutiny in death cases:

> [T]he penalty of death is qualitatively different from sentence a of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year of two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Godfrey v. Georgia, 446 U.S. 420 (1980), affirmed that, although a death penalty scheme was not declared constitutionally invalid on its face, its standards might prove to be "so vague [in their application] that they would fail adequately to channel the sentencing decision patterns of juries with the results that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." Id. at 428. In fact, the post-Furman experience has confirmed that such a pattern of arbitrary and capricious sentencing has emerged under the "revised" death penalty statutes.

In Furman, Justice Douglas expressed the view that the discriminatory and arbitrary manner in which the death penalty had been imposed in the United States violated the Equal protection Clause. He wrote:

> [T]he discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

408 U.S. at 255.

Has this discriminatory sentencing pattern been rectified by the complex, bifurcated death schemes such as that proposed in S.2397? Professor Charles Black of Yale School has provided the unequivocal answer:

> [A]fter all this travail, all this fiddling with 'standards', the same old people are right back on death row out in the states: the black, the poor, the

> disturbed, the dull-witted. About half are black -- though a startling recent study in three states whose statutes were sustained in July 1976, shows that almost nobody is there for having killed a black, and no white is there for having killed a black, though over half the victims of homicide were black. All these data speak for themselves. That is what the death penalty is actually about in the United states. Letter to Senator James Abourezk, May 5, 1978. Hearings Before the Senate Judiciary Committee on S. 1382, 95th Cong., 2d Sess. (April-May, 1978).

The study to which Professor Black referred was completed by William J. Bowers and Glenn L. Pierce of the Center for Applied Social Research at Northeastern University. Their report, which reinforces the view that caprice and mistake are an inevitable commitment of the decision to impose death, concludes:

> In the first five years after the Furman decision, racial differences in the administration of capital statutes have been extreme in magnitude, similar across states and under different statutory forms, pervasive over successive stages of the judicial process and uncorrected by appellate review. Moreover, these differential have been fully consistent with the pattern of racial disparity occurring under capital statutes invalidated by the Furman decision. That is, differential treatment by race of offender and victim has been shown to persist post-Furman to a degree comparable in magnitude and pattern to the pre-Forum period.

"Arbitrariness and Discrimination Under Post-Furman Capital Statutes, "Capital Punishment in the United States 629 (1980).

Nor is it likely that further tinkering with the death penalty statutes can avoid this result. As Justice Marshall stated in Godfrey v. Georgia, 446 U.S. at 442, "the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system."

Whether or not the Supreme Court accepts the ACLU's position that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, the Court may soon recognize, as should Congress, "that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it -- and the death penalty -- must be abandoned altogether." Id at

442. In fact, the Supreme Judicial Court of Massachusetts has overturned as unconstitutional that state's death penalty bill, noting that the arbitrary and capricious infliction of the death penalty is unconstitutional and the the post-Furman death penalty statutes have not been able to eliminate such arbitrariness. District Attorney for the Suffolk District v. Watson, 411 N.E. 2d 1274, 1286 (1980).

S. 239 attempts to deal with the serious problem of invidious discrimination by providing for instructions to the jury that it should "not consider the race, color, national origin, creed, or sex of the defendant" in deciding whether to impose the death sentence. In addition, each juror must sign a certificate indicating that such factors were "not involved in reaching his or her individual decision." Yet this provision cannot eliminate the effects of racial discrimination in securing death sentences. First, it does not address the issue of racial discrimination at the prosecutorial stage. The unreviewable discretion of the prosecutor either to seek or to shun the death penalty in a certain case surely undermines the effectiveness of any measure aimed at reducing the discrimination of only the jury. If prosecutors drag only Blacks to the capital sentencing block, the result of even the fairest, most impartial, and least discriminatory sentencing procedures will still be racially biased.

Second, Judges have routinely cautioned juries not to allow their prejudices to influenece their deliberations, but the record clearly show a racially discriminatory pattern in capital sentencing. One veteran obsever of death penalty cases, who has witnessed both state and federal jury selections in North Carolina, South Carolina, Florida, Georgia, New York, Oklahoma, Texas, South Dakota and Pennsylvania, comments on this issue as follows:

> The standard question asked of jurors to determine their racial prejudice is: 'Now, Mr. Jones as you can see, the defendant on trial here is a black man. The victim in this case was a white man. Do you think that this fact will affect your ability to be fair in this case?" During the voire dire of thousands of persons, the author has yet to witness one who responded that this might affect him.

Mullin, "The Jury System in Death Penalty Cases: A Symbolic Gesture," 43 L. & Contempt. Prob. 136, 151 (Autumn 1980).

Despite such denials, the record of death penalty cases attests with clarity that racial prejudice seriously affects capital sentencing decisions. For example, as the Massachusetts Supreme Judicial Court noted in Watson, supra, the experience under the post-Furman death penalty statutes revealed the following pattern:

1. In Florida, of 286 blacks who killed whites, 48 were sentenced to death; of 111 whites who killed blacks, none were sentenced to death.

2. In Texas, of 344 blacks who killed whites, 27 were sentenced to death; of 143 whites who killed blacks, none were sentenced to death.

3. In the northern state of Ohio, 173 blacks who killed whites, 37 were sentenced to death; of 47 whites who killed blacks, none were sentenced to death.

Whether this pattern results from intentional or unconscious racial bias, there is little reason to believe that the cautionary instructions and the certification requirements of S. 239 can overcome the clear constitutional violations associated with indivious racial discrimination.

C. The Unconstitutionality of the Method of Execution Prescribed by S. 239.

In addition to delineating the procedures by which an individual may be selected for death, the Eighth Amendment limits the punishment which may be set for a crime. The Eighth Amendment forbids punishment which is torturous, or otherwise inconsistent with the fundamental principle of human dignity. See Gregg v. Georgia, 428 U.S. 153, 170-173 (1976); See also, Furman v. Georgia, 408 U.S. 238, 360 (1972) (Brennan concurring).

Section 3596 of S. 239 provides that an individual sentenced to death under S. 239 will be executed in "the manner prescribed by the law of the state in which the sentence is imposed." If the state in which the sentence is imposed does not provide for the death penalty, the sentencing court may select the procedure of any state which has a death penalty. S. 239 therefore prescribes as many methods of imposing death as there are states which have such methods.

Currently, thirty-seven states prescribe death as punishment for crimes. Fourteen of the jurisdictions prescribe death by electrocution, sixteen by lethal injection, seven by gas chamber, four by hanging and two by firing squad. Six states prescribe death by more than one method. See American Civil Liberties Union, Death Row Census (May 1, 1985) (Compiled from data collected by the NAACP Legal Defense and Education Fund Inc.) Despite the wide variety of ways in which death may be imposed there has not been any determination by Congress that any one or all the methods of punishment prescribed by S. 239 are not so cruelly inhumane as to offend the Constitution.

Death by Electrocution is Unconstitutional

There is growing evidence that the method of execution used by a substantial number of states violates the eight amendment prohibition against cruel and unusual punishment. In his dissenting opinion in Glass v. Louisiana, 105 S. Ct. 2159 (1985) Justice Brennan's description of death by electrocution, leads inescapably to the conclusion that electrocution is an extremely violent event which inflicts pain and indignities far beyond the mere extinquishment of life. Justice Brennan quotes routine reports by witnessess that:

> when the switch is thrown, the condemned prisoner 'cringes', 'leaps', and fights the straps with amazing strength'. The hands turn red, then white, and the cords of the neck stand out like steel bands. The force of the electrical current is so powerful that the prisoner often defecates, urinates and vomits blood and

> drool. Glass v. Louisiana, 105 S. Ct. 2159, 2164 (1985).

Justice Brennan's demonstrates that death by electrocution is not only degrading and violent but extremely painful as well:

> The [electrical] current flows along a restricted path into the body and destroys all the tissue confronted in the path ... in the meantime vital organs may be preserved; and pain too great for us to imagine is induced.

The reports which Justice Brennan discusses in his opinion in Glass argue persuasively that death by electrocution is beyond contemporary standards of human decency. Consequently S. 239 should not prescribe electrocution as a method of punishment S. 239.

Cases which have previously held that death by electrocution did not violate the constitution are premised on notions which are no longer supported by the facts. The Supreme Court's decision in In Re Kemmler, 136 U.S. 436 (1890), which held that the Constitution did not preclude the state of New York from proceeding with the first electrocution over 95 years ago, placed great weight on the assumption that death by electrocution was "instantaneous and therefore painless". This assumption is cast into serious doubt by Justice Brennen's opinion and statements by state legislators which have abandoned the electric chair as a "barbaric torture device" and electrocution as a "gruesome ritual". See Glass v. Louisiana, 105 S. Ct. 2159, 2169 (1985) (Brennen dissenting).

Other Methods of Execution

There is additional evidence that another prevalent methods of execution cause lingering and torturous death. Execution by lethal injection can leave an individual conscious but paralyzed while dying a slow lingering death by asphyxiation. See Chaney v. Heckler, 718 F.2d 1174 (1984), reversed on other grounds, 84 L E 2d 714 (1985). On the basis of information which is currently available, it is unlikely that the penalty prescribed by S. 239, can pass constitutional muster. This evidence

about the most common methods of execution used by the states should prompt this committee to undertake a detailed study of the methods by which death is imposed in the jurisdictions which would under S. 239 impose death under federal law. This Committee cannot ignore its constitutional responsibility to prescribe only those punishments which accord with the dignity of the individual, the basic concept underlying the Eighth Amendment. See Gregg v. Georgia, 428 U.S. 153, 173 (1976).

## III. THE EXTENSION OF THE DEATH PENALTY TO CRIMES FOR WHICH DO NOT RESULT IN DEATH IS AN UNCONSTITUTIONALLY DISPROPORTIONATE SANCTION.

### A. The Imposition of the Death Penalty for Non-Homicidal Crimes.

The United States Supreme Court has declared that the eighth amendment prohibition of cruel and unusual punishment limits the ability of the government to provide the death penalty for any crime it wishes. Coker v. Georgia, 433 U.S. 584 (1977). Coker held that the death penalty was a constitutionally impermissible sentence for a non-homicidal rape. The tenor of the Court's opinion in Coker is that the death penalty is an excessive -- and therefore, "cruel and unusual punishment" -- unless the defendant causes the death of another human being. In fact, since Furman "homicide has been the only crime...to survive an explicit test under the eighth amendment's prohibition." Gillers, "Deciding Who Dies", 129 U. Pa. L. Rev. 1, 2 n.2 (1980). Since S. 239 authorizes the imposition of the death penalty for the crimes of treason and aggravated espionage regardless of whether death occurs, as well as for the crimes of attempted assassination, Coker raises grave doubts about the constitutionality of this statute.

#### 1. Treason and Espionage

As Chief Justice Burger stated in his dissent in Coker:

> The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in the death of a victim. This casts serious doubt upon the constitutional

> validity of statutes imposing the death penalty for a variety of conduct which, though dangerous may not necessarily result in any immediate death, e.g. treason, airplane hijacking, and kidnapping.

433 U.S. at 621 (emphasis added).

Treason and espionage are both serious offenses deserving serious punishment. That does not mean, however, that the death penalty is a constitutionally permissible sanction for these crimes. In determining whether a punishment is excessive and therefore cruel and unusual within the meaning of the eighth amendment, the Supreme Court has advised that one's judgment should be informed by objective factors to the maximum extent possible. Coker advises that weight must be given to the country's demonstrated judgement concerning the acceptability of the punishment of death for these crimes.

While the death penalty has been available for treason since 1790, the crime of espionage did not carry this punishment until 1917, and then only in wartime. It was not until 1954 that the death penalty was extended to peacetime espionage, and no one has ever been executed for this crime. In fact, in the last fifty years the ultimate result of the judgments of prosecutors, judges, and juries has been unanimous on the issue of the suitability of death as a punishment for treason: from 1930 until the present there has not been a single execution for treason. Over this same period covering the last half century there have only been two executions for espionage -- the Rosenbergs were executed during wartime in 1952. This isolated and still controversial application of the ultimate sanction during a period of highly charged emotions would seem to validate that view that: "[t]he extreme rarity with which applicable death penalty provisions [for espionage] are to put to use raises a strong inference of arbitrariness." Goldberg & Dershowitz, "Declaring the Death Penalty Unconstitutional," 83 Harvard Law Review 1773, 1792 (1970).

Since 1952, no one has been executed for either espionage or treason although a number of convictions for these crimes can be found in the federal reporter. The Supreme Court in Coker was impressed by the fact that since 1954 "in the vast majority of cases, at least nine out of ten, juries have not imposed the death sentence" for rape when it concluded that death for non-homicidal rape was excessive. Coker 433 U.S. at 597. During the same period, the judgement not to impose death for treason and espionage has been made in 100 percent of the cases. In light of the country's implicit rejection of capital punishment for treason and espionage it must be concluded that death is indeed a disproportionate penalty for these crimes. It should also be noted that the Reagan Justice Department, which supports the use of the death penalty, advised that this sanction should not be applied in cases of peacetime espionage. Letter to Chairman Strom Thurmond from Michael W. Dolan, Acting Assistant Attorney General, Office of Legislative Affairs, Hearings Before the Senate Judiciary Committee on S. 114, at 25 (May 26, 1981).

2. Attempted Assassination of the President

Under current law, one who attempts to assassinate the President or Vice-President, or a few other specified officials, is subject to punishment of life by imprisonment. 18 U.S.C. Sec. 1751. By definition, if one is convicted of this crime, he has not committed murder nor has he taken the life of another individual. Thus, while attempted assassination is an extremely serious crime that deserves serious punishment, in terms of "the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of another human life." Coker v. Georgia, 433 U.S. 584, 598, (1977). Consequently, the same consideration that led the United States Supreme Court to express its "abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,'...is an excessive penalty for the rapist who, as

such, does not take human life," leads to a similar conclusion with respect to the crime of attempted assassination.

The Coker decision reflected the judgement of the Supreme Court that the Eighth Amendment would be violated if an individual who was convicted of rape but who did not kill his victim were ever sentenced to death because "(i)t is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer..." 433 U.S. at 600. Yet, while the crime of rape always involves severe physical violations and mental and psychological damage to its victim, the crime of attempted assassination need not. As the two assassination attempts on Gerald Ford reveal, the crime of attempted assassination may not involve any physical injury of any kind nor cause any lasting mental or psychological damage. If, as the Supreme Court has determined, the infliction of death is constitutionally barred because it is grossly out of proportion to the severity of inflicting the palpable and egregious injury attendant to the crime of rape, then it is clearly improper to provide for such punishment where much less injury may have occurred. Congress' longstanding recognition of the relative severity of the general crimes of murder and attempted murder is reflected by its determination that, while murder is a capital crime, attempted murder is punishable by a fine of not more than $1000 and imprisonment of not more than three years. 18 U.S.C. Sec. 111.

S. 239 seeks to limit the use of the death penalty for attempted assassination to those cases where the attempt "results in bodily injury to the President or comes dangerously close to causing the death of the President." Two examples will illustrate that these limitations do not prevent the unconstitutional application of the death penalty. If an individual shoves the President while shouting "death to presidents" causing him or her

to fall to the ground, the individual could be sentenced to death under S. 239 if the President's knee is scraped. The requirement of "bodily injury" is met by the scrape, and the individuals total inability to effectuate the intention of killing the President is not a defense to the crime of attempted assassination. The overbreadth of the second limitation -- the attempt "comes dangerously close to causing the death of the President" -- is illustrated by the Squeaky Fromme case. U.S. v. Fromme, 405 F. Supp. 578 (E.D. Cal. 1975). While walking across Capital Park to the California State Capitol on the morning of September 5, 1975, President Ford observed a woman move to within two feet of him holding a .45 caliber pistol. The gun, which contained live bullets in the magazine but not in the chamber, did not fire, and the woman was immediately wrestled to the ground. President Ford was so unperturbed by the occurrence that he did not even mention it in his immediately ensuing meeting with Governor Jerry Brown. Yet, surely we can expect prosecutors to argue that Squeaky Fromme came "dangerously close" to killing the President. S. 239 provides little guidance to a jury that might have to determine whether a death sentence can be given in such a case.

Moreover, the imposition of the death penalty for the crime of attempted assassination is barred by the eighth amendment not only because it is "grossly out of proportion to the severity of the crime" but because it "makes no measurable contribution to acceptable goal of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker, supra, 433,U.S. at 592. Certainly, the punishment of death for the crime of attempted assassination cannot be justified on the grounds of deterrence. In fact, the recent assassination attempt by John Hinckley reveals that the emotionally troubled loners who seem to pursue this particular criminal conduct are searching for recognition or fame in a final

desperate suicidal act. Mr. Hinckley specifically stated in a letter written just prior to the assassination attempt that the expected to be killed while engaging in his bizarre scheme to prove his love for actress Jodie Foster. Certainly, the prospect of death was not a deterrent, and indeed it seems to be one of the primary attractions of the crime that Hinckley selected. Consequently, by providing for the death penalty for attempted assassination, Congress would enable such troubled individuals to fulfill their death wish in a spectacular fashion. This penalty, then, clearly would not serve to protect the President by deterring crime. Yet, as Justice White noted in his concurring opinion in Lockett v. Ohio, 433, 625-26 (1978), absent such deterrent value the infliction of death "fails to contribute significantly to acceptable or, indeed, any perceptible goals of punishment," and is therefore a cruel and unusual punishment prohibited by the eight amendment.

B. The Unconstitutionality Of Applying The Death Penalty Under a Felony-Murder Theory

S. 239 provides under a felony-murder theory that a defendant convicted of certain enumerated offenses can be sentenced to death if anyone dies as a result of the crime. The death sentence can be imposed on the defendant whether or not (s)he intended to kill anyone. As a result of the application of this principle of vicarious liability, "a defendant can be sentenced to death for a killing which he did not intend, approve, or abet." Note, "The Constitutionality of Imposing The Death Penalty for Felony Murder," 15 Hous. L.Rev. 356, 381 (1978).

This result is clearly unconstitutional under Enmund v. Florida, 458 U.S. 782 (1982). In Enmund the Supreme Court held that the State of Florida could not execute an individual who had participated in a robbery during which two deaths occurred in the absence of proof that the individual killed, attempted to kill, or intended to kill the victims.

## IV. PROCEDURAL DEFECTS IN S. 239 CAPITAL SENTENCING SCHEME

### A. The Unconstitutionality of Nonunanimous Federal Jury Decisions

Section 3594 of S. 239 provides that, unless certain statutory aggravating factors are found to exist, the death penalty cannot be imposed. Remarkably, however, the bill does not require that juries must agree unaminously on the existence of a specific aggravating factor before it can impose the death sentence.

The problem with such a scheme can readily be illustrated. Consider a case in which the defendant has been charged with four aggravating circumstances. Under the above procedures, the defendant could be sentenced to death if all of the jurors believed (s)he did not violate the first or second aggravating factor, but a majority thought she had violated either the third factor, or the fourth circumstance existed. As Judge John Minor wisdom has observed.

> Requiring the role of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required.

United States v. Gipson, 533 F.2d 433, 458 (5th Cir. 1977). Since S. 239 does not require that all jurors agree concerning the defendant's conduct, it violates the Fifth, Sixth, and Eighth Amendments to the United States Constitution for the reasons set forth below.

#### 1. Sixth Amendment Considerations

Article III, Sec. 2, cl.3 of the United States Constitution, as well as the Sixth Amendment, affords a federal criminal defendant the right to trial by jury. Rule 31(a) of the Federal Rules of Criminal Procedure states, "The verdict shall be unanimous." This rule was made by the United States Supreme Court with the concurrence of Congress pursuant to 18 U.S.C. Sec. 3771. S.239, in attempting to depart from the established

federal practice of unanimous jury findings raises the question of whether the unanimous jury requirement of Rule 31(a) is constitutionally based. Of course, if it is so based the Congress cannot alter the right by mere legislation, and any attempt to do so would be unconstitutional.

As Judge Wisdom, writing for the fifth circuit has stated:

> In its most recent pronouncement on the unanimous jury question -- the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972) -- the Court held that the sixth amendment requires a unanimous verdict in a federal criminal trial despite the fact that the sixth amendment, which is applicable to the states through the fourteenth amendment under Duncan v. Louisiana, 391 U.S. 145 (1968), does not impose a similar requirement on state criminal proceedings. It is thus settled that a federal criminal defendant has a constitutionally based right to a unanimous jury verdict." United States v. Gipson, 553 F.2d., 453, 456 (5th Cir. 1977) (footnote omitted; emphasis added.)

The Supreme Court has long recognized that the Sixth Amendment requires unanimity in federal criminal jury trials. As Justice Powell wrote in concurring opinion in Johnson:

> In an unbroken line of cases reaching back into the late 1800's, the Justices of the Supreme Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trials. Andres v. United States, 333 U.S. 740, 748-749 (1948); Patton v. United States, 281 U.S. 276, 288-290 (1930); Hawaii v. Mankichi, 190 U.S. 197, 211-212 (1903) (see also Mr. Justice Harlan's dissenting opinion); Thompson v. Utah, 170 U.S. 343, 355 (1898). In these cases, the Court has presumed that unanimous verdicts are essential in federal jury trials, not because unanimity is necessarily fundamental to the function performed by the jury, but because that result is mandated by history. The reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them as common law. At the time the Bill of Rights was adopted, unanimity has long been established as one of the attributes of a jury conviction at common law.

406 U.S. at 369-371 (citations omitted).

Johnson and Apodaca clearly establish that the Sixth Amendment mandates unanimous verdicts of guilt in federal jury trials. Is it possible though that unanimity would not be required for a jury finding of an aggravating circumstances

during the sentencing phase of a capital offense? As explained in further detail below, this contention is without merit for three reasons: (1) the common law tradition that Justice Powell argued in Johnson has been preserved in the Sixth Amendment requires a unanimous jury decision for every essential determination that is a prerequisite to the imposition of death sentence; (2) as indicated by Gregg v. Georgia, 428 U.S. 153 (1976), and it companion cases, the finding of a statutory aggravating circumstance defined in S. 259 is the constitutional equivalent of finding an essential element of the substantive offense of capital murder; and (3) the sixth amendment requirement of unanimity applies to all these issues, including punishment, that are left to the jury. Andres v. United States, 333 U.S. 740, 748 (1948). First it is clear that the requirement of unanimity in death sentencing proceedings respects the common law tradition. Model Penal Code, Draft #9, at 78. National Commission on Reform of Criminal Laws, Working Papers, Volume II, at 1375. Throughout the history of Anglo-American criminal law prior to the enactment of the Bill of Rights, mandatory fixed penalties existed for felonies. Note, "Procedural Due Process at Judicial Sentencing for Felony," 81 Harv. L. Rev. 221 n.2 (1968).

> A corollary of the provision of an officially invariable penalty for each felony was that once a man was found guilty of a particular felony and it was found that there was no legal impediment to the imposition of sentence, there was one appropriate of 'fitting' penalty, which had been fixed by the legislature. No further proceedings were necessary on the issue of quantum punishment.

Id. at 821-822 (citations omitted).

Thus, the common law jury's unanimous decision to return a verdict of guilt for a capital felony is equivalent to a jury decision for the death sentence in the post-Furman capital sentencing schemes.

At common law, as well as under current Eighth Amendment law, the jury was apprised of mitigating evidence concerning the defendant's to die, id at 841, and the jury could avert the

imposition of the death penalty if it was swayed by this mitigating evidence. The common law jury was without power, though, to send an individual to his or her death unless it unanimously found the existence of every prerequisite element. In other words, the jury safeguard that was preserved by the framers in the sixth amendment required a unanimous decision for every essential factor by a jury apprised of all relevant mitigating evidence before a defendant could be put to death. Thus, the common law principle requiring unanimous jury determinations that is embodied in the Sixth Amendment applies with equal force to the jury determinations that are essential to decision to impose the death penalty under a modern capital sentencing scheme. Second, Gregg v. Georgia, determined that a death penalty statute would be constitutional only if the discretion to impose the death penalty is limited by requiring the sentencer to make specific findings of aggravating factors that focus upon the particularized nature of the crime. As a result, the role of the sentencer in finding the elements of aggravation during the punishment phase of a capital case is indistinguishable from a constitutional significance:

> While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.... In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances.... Otherwise the statutes are similar.
>
> Each requires the sentencing authority to focus on the particularized nature of the crime.

428 U.S. at 270-1 (citations omitted).

In light of the substantive equivalent between finding elements of aggravation the determination of guilt and finding aggravating circumstances during the punishment phase, it is inconceivable that the sixth amendment requirement of jury

unanimity would protect a federal defendant in the first instance but would be found inapplicable to the second.

Any contention that the sixth amendment unanimity requirement announced in Apodoca and Johnson could apply only to federal jury determinations of guilt but not to the finding of a statutory aggravating circumstance in the punishment phase of a capital case would clearly exalt form over substance. The Supreme Court has rejected this arid formalism as a means of determining what constitutional safeguards must be afforded to a criminal defendant and has stated that the resolution of such questions must depend on an analysis "that looks to the 'operation and effect of the law as applied and enforced by the State.'" Mullaney v. Wilbur, 421 U.S. 684, 699 (1975).

Similarly, a functional approach to the applicability of Apodoca and Johnson completely discredits any suggestion that unanimous jury findings can be dispensed with in the determination of statutory aggravating circumstances on the grounds that such finding bear only on the appropriate punishment.

Third, even if one were to argue successfully that a jury finding of an aggravating circumstance differs from a jury finding of the substantive elements of an offense, it would be a distinction without a difference for Sixth Amendment jury unanimity purposes. As the United states Supreme Court declared in Andres v. United States, 333 U.S. 740, 748 (1948):

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues -- character or degree of the crim, guilt and punishment -- which are left to the jury. (citation omitted)

In Andres, the Supreme Court examined the pre-Furman federal death penalty statute, which enabled the jury to find the defendant guilty of murder while simultaneously deciding, at its discretion, whether they should receive the death penalty or life imprisonment. The above quotation, which served as a predicate to the Court's analysis of the particular issue to be decided in

that case, clearly reflects the Court's belief that the Constitution requires that any federal jury decision concerning the crime or the appropriate punishment must be reached unanimously.

2. Fifth and Eighth Amendment Considerations

a. The Need for Greater Reliability in Capital Sentencing Procedures

The absence of the unanimity requirement in S. 239 also raises serious constitutional questions under the Eighth Amendment proscription against cruel and unusual punishment and the due process clause of the Fifth Amendment. The United States Supreme Court acknowledged in Ballew v. Georgia, 435 U.S. 223, 234 (1978) that as the number of jurors whose vote is necessary to secure a conviction is decreased "the risk of convicting an innocent person rises . . ." While the entire structure of criminal jurisprudence in the United States is designed to minimize this, the Supreme Court has taken additional precautions to ensure the accuracy of the fact-finding process when a defendant's life is at stake. Thus, a long line of cases has established that certain trial procedures that are sufficient for less severe penalties violate the eighth amendment when used to obtain a death sentence. Furman v. Georgia, 408 U.S. 238 (1972); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976) (per curiam); Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam); Lockett v. Ohio; 438 U.S. 586 (1978). As Justice Stewart wrote in Woodson v. North Carolina, 428 U.S. 280, 303-5 (1976):

> In Furman, members of the Court acknowledged what cannot fairly be denied "that death is a punishment different from all other sanctionos in kind rather than degree. See 408 U.S. at 286-291. (Brennan J., concurring.); id at 306. (Stewart J., concurring.) A process that accords no sigificance to relevant facets of the character and record of the individual offender or of the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind . . .

> While the prevailing practices of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment see Trop v. Dulles, 356 at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (Footnote omitted.)

Woodson, therefore, establishes the need for greater reliability in the determination that a death sentence should be imposed. By failing to require unanimous agreement concerning the existence of a statutory aggravating factor, which is one of the essential elements of a capital offense, S.239 will reduce the reliability of the death sentence determination below that which exists in any other federal criminal trial. Surely, such a practice is completely contrary to the articulated need for greater reliability in the death penalty setting and disregards the admonition of Justice Marshall that: "Where imposition of so 'unique' a penalty is concerned, a punctilious attempt to achieve complete, factual accuracy in decision-making should be insisted upon." Alford v. Florida, 436 U.S. 935, 940, (1978) (Marshall, J., dissenting from the denial of certiorari).

b. The Requirement That Juries Make Specific Finding of Aggravating Factors

The U.S. Supreme Court has repeatedly emphasized the importance of appellate review of jury decisions to impose death as a means of avoiding arbitrary and capricious sentencing. While S. 239 does require the jury to return a special finding as to each statutory aggravating or mitigating circumstances which is raised at the hearing, it grants the jury broad authority to consider any nonstatutory aggravating circumstance in deciding whether the

death penalty is justified. There is, inexplicably, no obligation to make any special findings related to these aggravating circumstances. Indeed, it appears that they need not be identified to the court nor their sigificance in the ultimate balance revealed.

However, if the jury does not specify what other factors affect its judgment, the possibility of rational appellate review is wholly undetermined. As the Supreme Court has noted: "It is of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

A number of fundamental constitutional objections can be raised to this provision. What is the jury free to consider? Could the jury find that the occurrence of murder on Sunday was an aggravating factor because it is worse to kill people on Sundays? Or that the defendant deserves death because the victim was a member of a socially prominent family? What if the jury did consider these factors in response to the judge's invitation to consider "any other aggravating factor?" No one would know because the jury is required to return special findings only on the statutory aggravating circumstances.

Unknown and unknowable factors get mixed into the decision without any means of supervision by the trial judge or review by the appellate court, in violation of the requirement that the sentencer's discretion be channeled "by 'clear, objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing the sentence of death." Godfrey v. Georgia, 466 U.S. 420, 428 (1980).

Indeed it is difficult to imagine how an appellate court can make a threshold determination of whether the sentence of death was imposed "under the influence of passion, prejudice or any other arbitrary factor," Sec. 3595(c)(1)(A), when the record

before it is silent on these critical jury deliberations. The whole process is so arbitrary and capricious that it is hard to avoid the conclusion that "Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under [a statutory scheme] that permit[s] this unique penalty to be so wantonly and so freakishly imposed." Furman, 408 U.S. at 310 (Stewart, J., concurring).

B. The Unconstitutionally Broad and Vague Aggravating Circumstances of S.239

The United States Supreme Court's decision in Godfrey v. Georgia, 466 U.S. 420 (1980) has clarified the consitutional responsibility of a government wishing to authorize capital punishment "to tailor and apply its law in a manner that avoid the arbitrary and capricious infliction to the death penalty." Id at 428. The Court reiterated that:

> Part of a State's responsibility in this regard is to define the crimes for which death may be a sentence in a way that obviates 'standardless §sentencing† discretion. 'Gregg v. Georgia, supra, 428 U.S. at 196, n.47. See also, Proffit v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). I must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' Id. (footnote omitted)

The broad and amorphous language of a number of aggravating circumstances of S.239 does not comport with these constitutional requirements. For example, the fifth aggravating circumstance of S.239 requires a jury to determine whether the crime was committed in a "heinous, cruel or depraved manner." Tne eighth aggravating circumstance is satisfied if the crime is committed after "substantial planning . . . to . . . commit an act of terrorism." Moreover, jurors will be asked to determine whether an attempted assassination--that may not have resulted in the firing of a single shot or in physical harm to anyone, such as the attempt on President Ford's life by Squeaky Fromme--came "dangerously close" to causing the death of the President. Clearly, the words of the statutory aggravating factors are:

> . . .so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur.

Gregg, 428 U.S. at 195, n.46.

Godfrey indicated that broad and amorphous language such as "heinous, cruel or depraved" is not sufficiently objective to establish any "inherent restraint on the arbitrary and capricious infliction of the death sentence . . . §because a† person of ordinary sensibility could fairly characterize almost every murder" in these terms. 466 U.S. at 428-9.

C. Inadequate Guidance to the Jury in Determining How to Decide Whether the Death Penalty Should be Imposed.

S.239 provides that the jurors must "weigh" aggravating factors against mitigating factors in order to determine whether a death sentence is appropriate. No guidance is provided, though, to indicate how this task is to be performed. Black describes the problem:

> One could have a lot of fun with the concept of "weighing" youth--vaguely so referred to--against the fact of the defendant's having implicated, by the felony--murder route, in the killing of a consul. Oranges and apples, the classic case of noncompatibility, can at least be "weighed" on the same scale. In the case of §the† death bill, the "weighing" metaphor serves only to implant a erroneous suggestion of there being any kind of compatibility at all among the "factors" listed . . . And no one will ever be able to compare cases and say why one died and one lived.

Hearings on S. 1132 before the Senate Judiciary Committee, at 211 (1978).

Surely a death sentencing procedure that renders inevitable such an unhappy prospect suffers the constitutional infirmity that it creates "a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 466 U.S. 420, 427 (1980).

D. S.239 Impermissibly Allocates the Burden of Establishing Mitigating Factors

Sec. 3693(c) of S. 239 provides that: "The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a prepon-

derance of the information." This shifting of the burden of proof for all mitigating factors to the defendant is not consistent with the Supreme Court's decisions in Mullaney v. Wilbur, U.S 648 (1975) and Patterson v. New York, 432 U.S. 197 (1977). These cases establish that, for those facts that have become so closely associated with the crime at issue, the burden of proof must remain on the prosecution to give society confidence that persons are not being punished by mistake. Society's greater interest in the reliability of determinations that death is the appropriate punishment in a given case makes these considerations apply a fortiori in the death penalty sphere.

As one commentator has observed:

> The Supreme Court has held that mitigating factors concerning the nature of the act and the character of the offender must be considered before capital punishment may be imposed. Roberts v. Louisiana, 97 S.Ct. 1993, 1996 (1977); Jurek v. Texas, 428 U.S. 262, 271-72 (1976). Whatever factors must be considered as a constitutional matter would have to be refuted by the prosecution beyond a reasonable doubt.

Note, 91 Harv. L. Rev. 94, 100-1 n.38 (1977).

Lockett v. Ohio, 438 U.S. 586 (1978), and Godfrey v. Georgia, 446 U.S. 420 (1980), establish that any mitigating circumstances present in the case must be considered as a constitutional matter. See Donohue, supra, 30 Cath. U. L. Rev. at 58-59. Accordingly, the attempt in S.239 to shift the risk of nonpersuasion concerning the existence of mitigating factors would violate due process of law and the Eighth Amendment.

E. Inadequate Appellate Review

In Gregg v. Georgia, 428 U.S. 153 (1976), and Profit v. Florida, 428 U.S. 262 (1976), the Supreme Court emphasized that adequate appellate review of the decision to impose a death sentence is constitutionally required.

Unlike other death penalty schemes that have received the approval of the Supreme Court, S. 239 does not provide for mandatory review by the highest court having jurisdiction over all death cases generated under the relevant capital sentencing law.

Despite the Justice Department's prior suggestion during the debate on S. 114 that appeals to the U.S. Supreme Court be mandatory in death cases, S. 239 does not provide for mandatory appeal to the Supreme Court but instead provides for appeal to the federal courts of appeal. This provision guarantees the absence of a uniform rational and consistent basis for the imposition of death that is required by the Eighth Amendment. The numerous conflicts among the circuit courts in interpreting federal laws reveal that discretionary review in the U.S. Supreme Court cannot guarantee the higher level of uniformity that is required in the federal death penalty sphere.

F. Other Constitutional Concerns

1. Waiver of Twelve-Member Jury

Another potential constitutional infirmity in S. 239 lies in the provision of the subsection 3593(b) that enables the parties to waive the requirement that the jury impaneled for sentencing be composed of twelve members. As the Supreme Court stated in Williams v. Florida, 399 U.S. 78, 103 (1970):

> In capital cases . . . it appears that no state provides for less than 12 jurors--a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty.

As the court emphasized in Ballew v. Georgia, 435 U.S. 223 (1978), the jury safeguard that is preserved by the Sixth Amendment is intended to enable a broad cross-section of the community to be represented in criminal law decision-making; if the number of jurors falls below a certain number the function of the jury is thwarted and the intent of the Sixth Amendment is violated. Society's interest in the accuracy of the determination whether to impose the sentence of death and uniform judgment of the States in insisting upon twelve jurors both suggest that this feature may be a constitutional imperative.

2. Confrontation Clause Considerations

The provision of subsection(d) that allows any evidence of aggravation to be presented to the jury during the sentencing

phase "regardless of its admissibility under the rules governing the admission of evidence at criminal trials" raises serious constitutional questions. Certainly, the evidentiary proscriptions against the admissibility of hearsay evidence and Confrontation Clause of the Sixth Amendment are "generally designed to protect similar values." California v. Green, 399 U.S. 149, 155 (1970). Thus, the attempt in S. 239 to give the government carte blanche in introducing hearsay evidence in order to obtain death sentence is clearly invalid.

Congress recognized as much in 1974 when it enacted the Anti-Hijacking Act of 1974. This bill, which contains a death penalty provision that is the forerunner of S. 239 specifically provides that "the admissibility of information relevant to any aggravating factors . . . shall be governed by the rules governing the admission of evidence" 49 U.S.C. Sec. 1473(c)(3). The Conference Report for the Anti-Hijacking Act noted that without this limitation, the death penalty would not "rest on evidence of recognized probative value." Conference Report No. 93-1194, 1974 U.S. Code Cong. and Admin. News 3996, 3999. The Supreme Court has recently held that "in all relevant respects" a capital sentencing hearing is "like the immediately preceding trial on the issue of guilt or innocence." Bullington v. Missouri, 451 U.S. 430 (1981). Surely, the use of hearsay and other non-probative evidence would "introduce a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." Beck v. Alabama 447 U.S. 625 (1980).

CONCLUSION

S. 239 is unconstitutional. In addition to prescribing death for crimes for which death cannot be constitutionally imposed, it breaks with an unbroken line of sixth amendment opinions which require jury unanimity in federal criminal trials. S. 239 contains broad and vague aggravating factors which

seriously increase the risk of uncertainty and unreliability in violation of the constitutional obligation to afford greater care in capital cases. Moreover, there are indications that the very heart of the legislation, the method of execution prescribed by S. 239 may be so violent and tortuous as to offend the Constitution.

Those who would support this bill should consider the admonition of former Supreme Court Justice Arthur Goldberg and Harvard Professor Alan Dershowitz:

> The successful functioning of the constitutional scheme depends in part of widespread willingness to respect fundmental law. Were the legislature and executive to show no constitutional restraint, the whole burden of constitutional enforcement of civil liberties would fall on the rather fragile institution of the Court. Tension between the branches might result from frequent confrontation, and the nonjudicial departments would lack the appreciation of constitutional limitations gained through experience, which might alleviate tension. More importantly, many government actions violative of constitutional protections would go unchecked. The judiciary simply cannot right every wrong. And, even if the courts do eventually decide that government encroachment on individual freedoms is unconstitutional, a great deal of harm might have been done in the meantime. Thus, it is crucial that the nonjudicial branches screen out as much unconstitutional action as possible before it reaches the courts.

Goldberg & Dershowitz, "Declaring the Death Penalty Unconstitutional," 83 Harv. L. Rev. 1773, 1808 (1970).

The CHAIRMAN. Mr. Kamenar, you may proceed.

## STATEMENT OF PAUL D. KAMENAR

Mr. KAMENAR. Thank you very much, Mr. Chairman.

My name is Paul Kamenar, executive legal director of the Washington Legal Foundation and I am also an adjunct professor of law at the Georgetown University Law Center.

We support the death penalty, as serving both the principled values of deterrence and retribution and in that regard, I differ with the rest of the people on the panel here, sitting with me.

We support and have been involved in many cases before the Supreme Court and indeed, in the current Walker spy cases. We have filed a brief with the courts in those cases that argues that the death penalty provision which is currently on the books for espionage, can indeed be applied.

I would like to submit for the record, Mr. Chairman, if I may, a copy of our brief which makes that point.[1] Indeed, the Justice Department after receiving that brief, and when ordered by the court to give its position, the Justice Department did not oppose it and in fact, said that our arguments are not without force.

What I am getting at, Mr. Chairman, is that it seems like everyone has been saying here that the Emperor has no clothes; that the current death penalty laws do not exist; they have no force.

I am here to say that the Emperor does have clothes and that the additional wardrobe offered by the proposed statute, S. 239, although well-intentioned, may very well, by its own weight, smother the Emperor with too many procedural safeguards and provide fertile ground for legal challenges. I would predict right now that if this law would be passed, you would not see one death penalty conviction under the statute, because all of the nooks and crannies that will allow crafty defense lawyers to argue for.

Briefly my argument is this. In the *Furman* v. *Georgia,* Supreme Court was considering only State crimes of your garden variety murders and rapes and was concerned about the thousands and thousands of murders and the few that were given the death penalty; and the problem that the death penalty may be imposed for arbitrary reasons such as minority status or whether they are poor.

Now, the Federal crimes that we are talking about are espionage, hijacking, kidnapping, assassination of the President, and so forth. There are not thousands and thousands of those kinds of crimes. Rather, you already have a very small class to begin with.

Second, those arrested for espionage are white middle class males and there can be no argument that the death penalty would be imposed on them because they are poor and minority. The court never required sentencing guidelines in those kinds of situations and did not rule at all on the Federal death penalty whatsoever.

So we argue that there is a difference between the kind of crimes that the Supreme Court has examined in the State cases, compared with the Federal capital crimes that we are talking about how and where you already have a narrow class by the very definition of the crime. The crime itself has its seeds of its own aggravating cir-

[1] Brief was placed in Committee file.

cumstances. You do not have to say how more aggravating an attempted assassination of the President is. You do not have hundreds of attempted assassinations.

There is no risk that the death penalty would be imposed because of the minority status of the defendant in these Federal cases, and *Furman* dealt solely with juries imposing sentences and not in light of experienced trial judge who is the sentencing authority in the Federal system.

Now, we next argue that if *Furman* is indeed applicable, and we do not think that it is, rule 32 of the Federal Rules of Criminal Procedure more than satisfies the eighth and fifth amendment of procedural safeguards. All the Supreme Court has said is that the sentencing authority must focus on the defendant and must focus on the nature of the crime. If you read rule 32, it already says that. The defendant can also bring any mitigating circumstance he wants before the court.

And in that respect, I agree with one of the speakers *Lockett* v. *Ohio*, saying you cannot limit mitigating factors. Let the defendant bring in everything he wants. Keep rule 32. I think that the committee was unwise to delete rule 32 in the provision of the bill.

What I am suggesting is what *Gregg* v. *Georgia* did. The Supreme Court in *Gregg* v. *Georgia*, even cited rule 32 as an example of the kind of rule that guides the sentencing authority. In other words, what we are only looking for is to minimize the risk that the death penalty would be applied for arbitrary reasons. You do not have to eliminate it altogether with hundreds of different procedural devices.

States are free to do that, of course, and it seems that they have gotten into trouble by providing so many procedural safeguards that it allows for defendants to escape from them.

Basically, I would conclude by stating that: (1) Considering the nature of the capital crimes charged in Federal cases: espionage, hijacking, and so forth, with no history of the death penalty being imposed because of race, and so forth; (2) coupled with the presentence requirements of rule 32, which was cited by the Supreme Court favorably in *Gregg* v. *Georgia*, by the way, the State of Georgia, when they rewrote their death penalty law after *Furman* did not touch their espionage or treason statute; they left it intact without providing all of these aggravating and mitigating circumstances; and (3) considering the fact that under Federal law, a Federal judge imposes the sentence who is appointed for life and insulated from outside pressures and prejudices, the compelling conclusion is that the death penalty can be imposed today, upon those found guilty of Federal capital crimes without violating the eighth or fifth amendments.

Just briefly, some of the points that we find in the bill that we object to. The death penalty is limited to only one statutory aggravating circumstance. There is no need to limit that. Let the aggravating circumstance be any one that the jury can find. Even though the bill says that the jury can consider nonstatutory aggravating circumstances, specifically it says that in order for the death penalty to be imposed, it has to find one statutory circumstance.

In other words, if there were only some nonstatutory aggravating circumstances that the jury found, they cannot impose the death

penalty. We think that this bill needlessly restricts the discretion of the jury.

There is no need for unanimity by the whole jury on the death penalty. Again, the Supreme Court does not require that. You do not even need a jury. The judge can simply do it.

We do not think that it is necessary to have the reasonable doubt provision for each aggreating circumstance.

Again, the Supreme Court does not require that.

The other thing that we object to is the mitigating circumstances which you allow, where it says, "if the defendant has a mental capacity that is significantly impaired," we object to that. But if you leave that in, we would like a qualifying phrase that that it cannot be used if the impairment is due to the voluntary ingestion of drugs or alcohol by the defendant.

You mentioned the *Roper* case, Mr. Chairman. That is a good case, because in the *Roper* case, the defendants were claiming that they were high on PCP and drugs when they butchered Stephanie Roper's daughter.

They used that as a mitigating circumstance. We think, that if anything, that is an aggravating circumstance, and should be so specified.

Our conclusion is that this law is too restrictive in terms of the room that the criminal justice needs to work here, and we think that the current laws with rule 32 are more than sufficient.

Thank you, Mr. Chairman.

[The prepared statement follows:]

## Prepared Statement of Paul D. Kamenar

My name is Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation, a non profit public interest legal center, with 200,000 members and supporters nationwide. We appreciate the opportunity to present our views on the death penalty and S.239.

Our Foundation supports the death penalty in appropriate cases as both a deterrent and as retribution. We have filed many briefs in the Supreme Court and lower federal courts supporting the death penalty and opposing groups such as the ACLU and NAACP Legal Defense Fund. In fact, we are the only nationally recognized public interest group that supports the death penalty.

We have submitted for the record our recent brief filed in the current Walker spy cases arguing that the current death penalty provision for espionage is constitutional, and the first federal district judge to address this issue so held in January 1984 in United States v. Harper. That decision was overturned by the Ninth Circuit at the insistence of both the traitor and the Justice Department. Consequently, no one appealed the decision to the Supreme Court. However, in the Jerry Whitworth spy case in California, Judge J.P. Vukasin, Jr. accepted our brief for filing and I argued the case before him on September 13, 1985. This time, however, the Justice Department did not agree with the defendant but took a more favorable view of our argument stating that it is "not without force." Unfortunately, the Court ruled against us, principally because of the Ninth Circuit opinion.

I will not detail at length our position, but I will summarize our argument as to why S.239 may be unnecessary. If legislation is deemed to be necessary, we believe that S.239 contains so many restrictions and unnecessary provisions such that the death penalty would be almost impossible to impose, or if it is, that it

would likely be reversed by arguments from smart defense lawyers. In short, S.239 is legislative overkill and we strongly oppose the Justice Department's suggestion in its June 27, 1985 letter to you suggesting yet further unnecessary restrictions to add to this bill.

S.239 IS UNNECESSARY

Contrary to popular belief, Furman v. Georgia, 408 U.S. 238 (1972) did not strike down federal death penalty statutes. The Supreme Court has not considered a single federal death penalty case. The only capital cases considered by the Supreme Court were state cases dealing with murder and rape. The issues in those cases were whether state sentencing procedures violated the due process clause of the 14th Amendment and the 8th Amendment. The concerns by some Justices was the risk that the death penalty might be imposed for arbitrary reasons such as race or economic status. The lesson from Furman and its progeny is simply that the state sentencing schemes should focus the attention of the sentencing authority on the crime and the defendant.

In the federal context, federal crimes for espionage, assassination, and the like are not comparable to garden variety murders where there are thousands of murders and the concern that only a few get the death penalty. In other words, espionage by its very definition in 18 U.S.C. §794 is narrowly defined and thus contains its own aggravating circumstances. Congress does not need to add more aggravating circumstances to espionage, assassination, hijacking, etc. to make them eligible for the death penalty. In short, the nature of the federal crime and its frequency already delimit the class of potential death penalty cases. For example, since 1954, there have only been about 40 arrests for espionage, too many in our view, but a very small number in relation to the number of murders. Further, those arrested for espionage are typically white middle-class males. In

short, no one can claim, not even the ACLU or NAACP, that the death penalty for espionage has come to be imposed in such a way for arbitrary reasons such as race or economic status.

Secondly, assuming arguendo that Furman v. Georgia does apply, the federal sentencing procedures under current law already satisfy the constitutional concerns. Under Rule 32 of the Federal Rule of Criminal Procedure, there is a separate sentencing hearing; a pre-sentence report is prepared; and aggravating and mitigating circumstances are presented to the federal judge who is experienced in sentencing unlike state juries. None of these procedures were present in the Georgia system in Furman. Indeed, in Gregg v. Georgia, the Supreme Court referred to Rule 32 suggesting that those procedures are sufficient. 428 U.S. at 190, n.37 (1976).

Thirdly, if those procedures are deemed insufficient to protect the constitutional rights of a defendant, (and we do not think they are), a federal court can, and indeed has the duty to, fashion procedural safeguards to uphold an Act of Congress. U.S. v. 37 Photographs, 402 U.S. 363, 372-73 (1971) (judicially imposed procedural safeguards are "fully consistent with congressional purpose and that will obviate the constitutional objections raised by claimant"). It is never, ever, considered "judicial activism" to uphold an Act of Congress. The opposite is true.

## CRITIQUE OF S.239

If the Committee is committed to "restoring" the federal death penalty (or, in our view "refurbishing" a current valid law) the present bill, S.239, will be self-defeating. It is a over-reaction to Supreme Court decisions that examined state laws on the subject. In other words, if a state (or federal) death penalty law provides more rights than are constitutionally required, then the state judicial system must uphold those statutory rights viewed in a constitutional context. Thus, as

more statutory rights are provided, one runs the risk that those procedures may be as successfully challenged as they are applied (or misapplied) in each individual case. There is more grist for the mill of defense lawyers. Thus, any bill should be kept very simple and merely provide the constitutionally minimum standards. Thus, all that is necessary is a re-codification of Rule 32 in some manner. Federal courts and lawyers are familiar with it. Why re-invent the wheel? Certainly, do not eliminate Rule 32 as proposed section 3593(b) does by eliminating a pre-sentence report. Our other objections are:

1. Do not limit the death penalty to only a finding of a specified statutory aggravating circumstance. Any aggravating circumstance will do under the constitution.

2. There is no need to require a finding of aggravating circumstances beyond a "reasonable doubt." While many states do, this is the federal system and the federal government need not copy state laws.

3. There is no constitutional requirement for unanimity by the jury, or even to have a jury at the sentencing phase. The following sentence in proposed §3593(d) states:

> The jury must find the existence of a mitigating or aggravating factor by a unanimous vote, although it is unnecessary that there be a unanimous vote on any specific mitigating or aggravating factor if a majority of the jury finds the existence of such a specific factor.

This makes no sense and is just fertile material for defense lawyers.

4. S.239 would allow under §3592(a)(2) a mitigating circumstance where the "mental capacity is significantly impaired." While we do not oppose any presentation of any mitigating factor the defendant chooses to make, we do not think

it should be a mitigating factor if the impairment is due to the voluntary ingestion of alcohol or drugs. If anything, that should be an aggravating circumstance.

There are many other problems with this bill, but just to ensure its proper interpretation by the courts, a provision should be added stating to the effect that "nothing herein shall prevent any federal court from adding additional procedural safeguards deemed constitutionally required by Supreme Court decisions." In that way, Congress will be assured that as 8th Amendment jurisprudence develops, further Congresses will not have to "restore" the death penalty again.

The CHAIRMAN. Thank you very much.

Senator Metzenbaum did not appear. I guess that he had conflicts but we will leave the record open until 6 p.m. Friday afternoon, if any Senator wants to put in a statement.

Senator DeConcini has sent a statement approving this bill.

I have asked that this statement be in the record.

I have asked that my statement be the first statement and that all of these other Senators' statements follow that, in order, put them all in order.

That would be the best way to arrange it, rather than to spread them throughout.

We now stand adjourned.

Thank you, people for coming and testifying, all of you.

[Whereupon at 3:25 p.m., the committee was adjourned.]

# APPENDIX

CITIZENS UNITED FOR REHABILITATION OF ERRANTS
"A NATIONAL EFFORT TO REDUCE CRIME
THROUGH CRIMINAL JUSTICE REFORM"

9/24/85

STATEMENT IN OPPOSITION TO S. 239

Members of the Judiciary Committee, my name is Charles Sullivan. I am director of CURE (Citizens United for Rehabilitation of Errants).

CURE is a national organization dedicated to reducing crime through the reform of the criminal justice system.

CURE started in 1972 in San Antonio, Texas. For 13 years, CURE has worked for prison reform in Texas.

Two months ago, CURE moved to Washington, D.C., and is attempting to expand to a national organization (see attached article).

CURE has always opposed the death penalty, and we express our total opposition now. The reasons for opposition have been expressed by other witnesses. We strongly agree with their reasons.

What I would like to do, however, in the remainder of my statement is point out why section 3597 "Use of State Facilities" should be amended substantially. If the federal government decides to execute, then it should determine the means and details of the execution.

Overall, it seems to me that the general principle of every right having a corresponding responsibility requires the federal government to conduct its own executions. Using state facilities is shirking responsibility, in my opinion.

Also, the state's correctional personnel are placed in a position of carrying out a decision by the federal government. This comes at a time when most prison systems are already angered about being taken over by the federal courts.

Even some correctional leaders are starting to complain about their role in state executions. For examples, Warden Marshall Herklotz of the Texas Department of Corrections publicly stated that he thought the counties in Texas should conduct their own executions. Later, he told me that "we get to know the individual, and then we execute him. The county made the decision, let the county implement the decision."

Another public comment came from Jennie Lancaster, Superintendant of the North Carolina Correctional Center for Women, concerning her involvement in the Velma Barfield execution. In a speech Ms. Lancaster gave in May she said that she and her staff considered resigning twice over this execution. They found this role to be contradictory as a professional in corrections. The prisoners even confronted them on how they could "talk about rehabilitation, and then, be a part of this execution". Ms. Lancaster concluded that "this is not our work" in regard to executions.

Thus, I feel that if the federal government decides to execute, then they should have their own employees do "the dirty work".

This includes doctors and medical personnel on the federal payroll. They should assist the execution, not the state's medical personnel.

In Texas (as well as a few other states) the mode of execution is lethal injection. Although the potential for involvement of medical personnel is always present in every execution, the potential is really heightened in lethal injection. Besides pronouncing death, there is writing the prescription and examining and preparing the condemned.

In 1982, Texas (and the United States) had its first execution by lethal injection. By the way, we became the only country besides and since Nazi Germany to use the needle as a mode of execution.

Dr. Ralph Gray, the doctor in charge of medical services in the Texas Department of Corrections, went so far as examining the veins of the individual before the execution. This compromising of the medical profession continues with every execution in Texas.

The new director of medical services for the prison system, Dr. Armand Start, has stated that he will not participate in any way in executions, and will not require his staff to participate. In June, the last session of the Texas Legislature placed his position in legislation. As recommended by the Texas Medical Association, the bill stated that not only doctors on the prison payroll but also any health care provider could not be forced to participate in executions as a condition of their employment.

Thus, if Texas' facilities are used by the federal government, there might even be a problem in finding medical personnel to assist in lethal injection.

Besides the "modern" means of execution, there is today the modern impact of the media on executions. If you think televising the proceedings of the Senate is controversial, just wait for the debate on televising executions!

The Attorney General of Texas is on record in total support of televised executions. Under S. 239, televised executions could occur to federal prisoners if the Attorney General's position is accepted by the Texas Legislature.

The federal government also could open itself to other controversial details of execution by the use of state facilities. For example, a district judge in Texas tried to set the date of Halloween night for the execution of Ronald O'Brien. O'Brien nicknamed the "candy man" by the Texas media was convicted of capital murder for giving poison candy to his son on Halloween night. Although the judge was not able to set the date, he did succeed in creating the circuslike atmosphere where "Halloween" parties occurred the night of O'Brien's execution (complete with the type of candy O'Brien gave his child).

Although this type of judicial behavior has not happened in prison administration, what in S. 239 would keep a state or local prison administrator from deciding the date and time when a federal prisoner would be executed?

This dependency on the modus operandi of state execution procedures could also extend to last-minute visits of the condemned and eyewitnesses. The sons of Charles Brooks were not allowed to say goodbye to their father before he was executed in Texas in 1982. With the use of state facilities, will this include the visiting regulations of the state institution?

Also , what about the members of Congress who want to witness the execution? Can the state for reasons such as security prohibit them?

Finally, at executions in Texas, there have been cheering crowds, and fights have broke out. Numerous correctional officers now patrol the blocks of Huntsville (the site of the execution) that are near the death chamber. Will the use of state facilities include this cost?

These questions and problems could be eliminated and/or lessened if the federal government used its own facilities and determined the details of the execution.

Moreover, they would be accepting the full responsibility for carrying out the details of the decision to take an individual's life.

In closing, I reiterate our total opposition to the death penalty. But, if it is to be on the federal level, it would seem that consistency and integrity would demand that the federal government determine and control its implementation.

The Dallas Morning News Sunday, September 15, 1985

# CURE pursues national goals

## Texas advocates of prison reform move to Washington

By William J. Choyke
Washington Bureau of The News

WASHINGTON — Charlie and Pauline Sullivan, longtime Texas advocates of prison reform, are living their own version of *Back to the Future*, the movie in which a young man moves backward in time.

Five weeks ago, the couple moved their operations from Austin to Washington. They are trying to turn the formerly Texas-based group Citizens for Rehabilitation of Errants into a nationwide organization lobbying for such things as better prison conditions and expanded prisoner rights.

But as the former Catholic priest and former nun look ahead, they mostly see a replay of the days 10 years ago when they began CURE with a prayer and a shoestring budget, "in that order."

Their small, one-bedroom apartment, in a somewhat rundown area of the city 15 blocks from the Capitol, doubles as their office, just as on their tiny apartment in Austin did in the mid-1970s.

And as they seek to build a network geared at nationalizing their Texas efforts, their nucleus of political support remains Texas friends from a decade ago — Rep. John Bryant of Dallas, Rep. Mickey Leland of Houston and Rep. Albert Bustamante of San Antonio, all Democrats.

"We reached a point in Texas where it was right to move on," said Pauline Sullivan. Her husband of 15 years said, "We got to the point in Texas where we were part of the establishment. We were co-opted by the system."

So the Sullivans left the Austin office they moved into in 1978, loaded their possessions into a rented U-Haul and set out for Washington. They came with $11,000, raised at a farewell fund-raiser last spring, and a reputation that, like in Austin, acceptance and success would not come overnight.

"I think another element in our decision is our age," said Charlie Sullivan, an Alabama native. "We are both in our mid-40s. We figure, like in Austin, it will take us another 10 to 12 years to have any great effect up here, and we thought we'd better get started now."

Legislators such as Bryant, who served in the Texas House from 1974-83, credit the Sullivans, along with U.S. District Court Judge William Wayne Justice of Tyler, with providing much of the impetus for prison reform in Texas in the last three years. Justice presided over the historic Ruiz vs. Estelle case, in which Texas prisoners successfully argued that they were being held in inhumane conditions.

"These two people are really an inspiration to anyone who believes they have a cause that needs legislative attention," Bryant said. "With total selflessness, they stayed at this issue in spite of a lack of funds, snubs and the hard going and ended up with a significant impact as well as the respect of everyone who knows the process."

Both left the clergy in the late 1960s, Charles Sullivan after a conflict with his bishop over Sullivan's leading Mass at segregated churches, and his disagreement with the Vatican's birth-control policy. Pauline Sullivan, who belonged to the Sisters of St. Joseph's, said she was "frustrated with the group's work and wanted to deal on a more grass-roots level with the problems of people." They later met and married.

Vietnam-era, anti-war protesters and community activists, the Sullivans were living in San Antonio when they began their crusade for prison reform in 1972 by organizing a bus service for prison relatives in San Antonio. At the time, they supported themselves through substitute teaching in an Hispanic area of the city. The buses took relatives to Huntsville to see their kin as well as to Austin to lobby for prisoner rights.

Three years later, the couple moved their operations to Austin, organized CURE and solicited memberships from the inmates, their relatives and other supporters, including former inmates.

While considered a small lobby — the $20,000 budget last year was derived from dues from 1,300 inmates and 1,000 other supporters — CURE rescued its pinnacle of success in 1983 by successfully lobbying for passage of a series of reforms that came about, in part, as a response to Justice's directives in the 13-year-old Ruiz case. Reforms ordered by Justice included ending prison overcrowding.

"They are going to be missed," said Paul Taylor, the Dallas CURE chapter president who has a 24-year-old son serving a life sentence for aggravated assault. "What they have done can't be replaced. I'm concerned that if people don't show enough interest, this group (CURE) will go by the wayside."

In Texas, the Sullivans were the only paid staff members. Chapters in Dallas, Houston, San Antonio and Waco are operated by volunteers.

Now, they see their chief goals as developing CURE state chapters nationwide, dealing with issues affecting the federal prison system and examining prison issues relevant to all parts of the country. For the next few months, Charlie Sullivan said the couple will spend their time "touching base with natural allies" ranging from reform-minded politicians to other public interest groups.

"We are going to have to sniff out the issues," he said, mentioning as an example the need to lobby for continuation of tax credits for businesses that hire ex-offenders. The program, which expires at the end of the year, is opposed by the Reagan administration.

"We know from Texas, you can make a difference," he added. "But it takes a long time."

[Washington Post, Dec. 17, 1985]

## BRING BACK THE DEATH PENALTY

(By Courtland Milloy)

Call me inhumane if you want, but in the wake of yesterday's conviction of six of the 10 defendants in the Catherine Fuller murder case, I say it's time to fire up "Ole Sparky."

That's the District of Columbia's electric chair, now gathering dust at Lorton Reformatory, and yes, I'm talking about bringing the death penalty back to this city.

After listening to many residents say what they felt should be done with Paul Jordan, who was recently convicted of butchering a woman and baby to death, as well as those on trial in the Fuller slaying, I am sure that there are many in this city who are ready for a change.

"I say hang them," said one man. "Fry 'em one by one," said another.

"The Bible says an eye for an eye," said David Fuller, the husband of the slain woman. "That's the way I feel."

The outrage is understandable. What we're talking about here is not deterring crime but seeking retribution for crimes committed. We're talking about sending a message that there are crimes so heinous that the person or persons who commit them should pay with their lives.

A few weeks ago, opponents of the death penalty—including Mayor Marion Barry and City Council Chairman David Clarke—had a fund-raiser because they know they are about to have a fight on their hands.

The arguments against putting someone to death ring of compassion.

Murderers usually kill only once, goes one plea. We might make a mistake and send the wrong person to death, goes the other. And in this city, especially, there is the old song that if the death penalty was brought back, mostly blacks would be sentenced to death.

But look at it this way: Our criminal justice system—from our top judges to the police chief to the head of the Department of Corrections—is now in the hands of black people.

The Supreme Court now allows the death penalty, but the D.C. government has made it clear in no uncertain terms that it should never be brought back.

Yet our criminal justice system has evolved into a revolving door of injustice that cries out for finality. For those convicted of heinous crimes against society, that finality should be death.

Meanwhile, there is a major point about the way criminal justice works in this city that should be understood.

From the day of the arrests in the Fuller murder case, according to informed sources, death contracts were being circulated and signed within the D.C. Jail and down at Lorton, where two of Fuller's sons are doing time.

Whether we want to admit it or not, "death sentences" are routinely meted out in our prison system.

They don't use electric chairs; they don't use ropes or guns. They use "shanks," long knives fashioned in the metalwork shop by inmates so proficient in their craft that they could go work for the Wilkinson Sword company tomorrow.

It is a cop-out to pretend that this society does not want and need its revenge. It does not serve the interest of the community to let the crime and punishment be in the hands of criminals.

When you get a guy like Paul Jordan who can go into a baby sitter's house and butcher-knife her and a baby—the child of two D.C. police officers—and then have him convicted and merely sent to prison so he can watch soap operas all day, this is not justice.

The same thing will happen to the six convicted yesterday, and that fact is an insult to the people of this city. Indeed, you can bet that at least one of them will be back on the streets before Fuller's 13-year-old son finishes high school.

Jordan will not be electrocuted. Neither will "Snot Rag," "Hollywood," or the other thugs who killed Fuller. But the city should be prepared, in the event that something like this ever happens again, to make the perpetrator pay the ultimate price.

Given the chicken-hearted nature of most criminals in this city, I'll bet that the prospects of sitting with Ole Sparky would be enough to deter at least some of them.

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